Office Supreme Court, U.S.
FILED
JUL 6 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

at

OCTOBER TERM, 1964.

Docket No. 249

SCOTT N. BROWN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Attorney for Petitioner.

THOMAS E. FOX,
Assistant Attorney-General,
Supreme Court Office Building,
Nashville, Tennessee,
Attorney for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE 621-5647

TABLE OF CONTENTS.

Citations to Opinions Below 2

Jurisdiction of This Court 2

Questions Presented 3

Constitutional Provisions Involved 5

Tennessee Code Sections Involved 5

Statement of the Case 6

Reasons for Granting Writ of Certiorari 14

Conclusion 15

Certificate of Service 16

TABLE OF AUTHORITIES.

Cases.

Broughton v. State, 199 S. E. 111 4

Cole v. Arkansas, 333 U. S. 196; 92 Law Ed. 644 ..... 4, 15

DeJonge v. State of Oregon, 299 U. S. 353; 57 S. Ct. 255 ..... 4, 15

Hamilton, Mary, v. State of Alabama, Supreme Court Reporter Advance Sheet, April 15, 1964, p. 982 ..... 3, 14

Johnson v. State of Virginia, 373 U. S. 61; 83 S. Ct. 1053 ..... 3, 14

Schware v. Board of Bar Examiners of the State of New Mexico, 353 U. S. 232; 77 S. Ct. Rep. 752 ..... 3, 14

Thompson v. City of Louisville, 362 U. S. 199; 80 S. Ct. 624 ..... 3, 14

Constitution.

Constitution of the United States:

Sixth Amendment 14

Fourteenth Amendment, Section 1 ..... 3, 5, 14, 15

Statutes.

Tennessee Code Annotated:

Sec. 39-4226 ..... 3, 5, 6, 13, 14, 47a

Sec. 39-4237 14

Sec. 40-2516 5

Sec. 47-964 5

Sec. 47-1002 5

Sec. 47-1020 ..... 3, 5, 6, 12, 13, 14, 48a

28 U. S. C. 1257(3) 2

INDEX TO PETITIONER'S APPENDIX.

(Printed under separate cover.)

Indictment 1a

Witnesses:

- Winfield Baird 6a
- Scott N. Brown 30a
- Bernard J. Cassidy 11a
- Character Witnesses 46a
- William Dunstan 21a
- Ralph I. Reece 24a
- William T. Salter 4a
- Eloise Thomas 9a
- Donald E. Wilding 21a

Tennessee Code Annotated—Charge to Jury 47a

Judgment of Trial Court 50a

Motion for New Trial 51a

Judgment of Trial Court Overruling Motion for New Trial and Granting Appeal 52a, 53a

Assignments of Error in Supreme Court of Tennessee 54a

Opinion of Supreme Court of Tennessee 61a

Judgment of Supreme Court of Tennessee 67a

Petition to Rehear 68a

Opinion of Supreme Court on Petition to Rehear 71a

Judgment of Supreme Court on Petition to Rehear 72a

Order of Supreme Court Permitting Second Petition to Rehear 73a

Second Petition to Rehear 73a

Opinion of Supreme Court on Second Petition to Rehear 78a

Final Judgment of Supreme Court Filed April 30, 1964 ..... 81a

Order of Supreme Court Staying Judgment Until Petition for Certiorari Is Acted Upon by Supreme Court 81a

In the Supreme Court of the United States

OCTOBER TERM, 1964.

Docket No. _____.

SCOTT N. BROWN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petitioner, Scott N. Brown, prays for the issuance of writ of certiorari to the Supreme Court of the State of Tennessee sitting at Knoxville, affirming the judgment of the Second Division of the Criminal Court of Hamilton County, Tennessee, finding him guilty of fraudulent breach of trust and adjudging that he be confined in the State Penitentiary for three years and pay the costs of the cause.

CITATIONS TO OPINIONS BELOW.

The Trial Court did not write any opinion but judgment of that court is at 50a of the Appendix hereto, and judgment overruling defendant's motion for a new trial and granting an appeal to the Supreme Court of Tennessee is at 51a. The opinion of the Supreme Court of Tennessee has not been published but the opinion and judgment affirming the Trial Court and opinion and judgment overruling the first petition to rehear, and opinion and judgment overruling the second petition to rehear are at 61a-68a; 71a-72a; 78a-81a. The judgment of the Supreme Court of Tennessee staying the judgment of that court and the court below until this Honorable Court could act on this petition is at 81a.

JURISDICTION OF THIS COURT.

The opinion and judgment of the Supreme Court of Tennessee was filed and entered on January 8, 1964. A timely petition to rehear was filed and on March 5, 1964, the Supreme Court filed its opinion and judgment was entered on April 7, 1964; but on March 16, 1964, judgment was entered permitting the plaintiff in error, Scott N. Brown, to file a second petition to rehear and granting him until Monday March 23, 1964, in which to file said petition. Said petition was duly filed on March 23, 1964, and on April 8, 1964, the Supreme Court filed its opinion on the second petition to rehear and final judgment was entered on April 30, 1964. On the same date an order was made permitting plaintiff in error to file petition in the United States Supreme Court for a writ of certiorari (78a-82a). The Supreme Court of Tennessee is the highest appellate court in the State of Tennessee.

Jurisdiction of this Court is invoked under sub-section 3 of Section 1257, Title 28, United States Code Annotated.

QUESTIONS PRESENTED.

(1) Does the State of Tennessee in this cause deprive your petitioner of his liberty and property without due process of law by convicting him in the Criminal Court of Hamilton County, Tennessee, of the offense of fraudulent breach of trust, as charged in the indictment, and adjudging the costs against him (2a-3a), when there was no proof whatsoever to support the conviction of the defendant in the Trial Court, as shown by his motion for a directed verdict in his favor at the conclusion of the State's proof (27a-30a), and Ground II of his motion for a new trial, 51a, and Assignment I of his Assignments of Error in the Supreme Court (54a-58a), and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, as was held by the Supreme Court in the case of *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232; 77 S. Ct. Rep. 752; *Johnson v. State of Virginia*, 373 U. S. 61; 83 S. Ct. 1053; *Thompson v. City of Louisville*, 362 U. S. 199; 80 S. Ct. 624, and in the recent case of *Mary Hamilton v. State of Alabama*, Supreme Court Reporter Advance Sheet, April 15, 1964, p. 982?

(2) Does the State of Tennessee deprive your petitioner of his liberty and his property without due process of law by indicting him under Section 39-4226, Tennessee Code Annotated, charging him with fraudulent breach of trust (2a, 3a, 47a), and trying and convicting him under an entirely different setion, to-wit, Section 47-1020, Tennessee Code Annotated, which had no application to the facts in this cause and was intended by the Legislature of Tennessee to apply to automobile floor plans, merchandise manufacturing and other similar financing plans, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and denying to him the equal protection of the law, as was held by the Supreme

Court of the United States in the case of *DeJonge v. State of Oregon*, 299 U. S. 353; 57 S. Ct. 255, and also by the Supreme Court of the United States in the case of *Cole v. Arkansas*, 333 U. S. 196; 92 Law Ed. 644?

(3) Does the State of Tennessee deprive petitioner of his liberty and property without due process of law by convicting him in the Criminal Court of Hamilton County, Tennessee for the offense of fraudulent breach of trust, as charged in the indictment, and adjudging the costs against him, when he plead "Not Guilty" to the indictment and was tried and the indictment was not given to the jury, as set out in Ground 7 (51a) of his motion for a new trial and Ground III of his assignments of error in the Supreme Court of Tennessee, which was affirmed by the Supreme Court, as was also the conviction in the two preceding questions, and does this violate Section 1 of Amendment 14 to the Constitution of the United States and deny to him the equal protection of the laws, as illustrated by the holding of the Supreme Court of Georgia in the case of *Broughton v. State*, 199 S. E. 111; where the Supreme Court held:

> "We believe it to be an accepted and established custom, in the trial of criminal cases in this State, to send the indictment out with the jury when they enter upon their deliberations, a practice, hoary with age, acquiesced in for a time whereof the memory of man runneth not to the contrary must be the law"?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is that part of Section 1 of the 14th Amendment to the Federal Constitution which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

and Amendment 6, which recites the rights of the accused:

> "In all criminal prosecutions the accused shall enjoy the right * * *, and to be informed of the nature and cause of the accusation * * *."

TENNESSEE CODE SECTIONS INVOLVED.

Section 40-2516, relating to the Court's charge in felony cases:

> "Every word of the charge shall be written, as read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement."

Section 39-4226 (47a-48a).

Section 47-1020 (48a-49a).

Section 47-964—Definitions.

"Goods" means chattels or merchandise in storage, which has been or is about to be stored.

Section 47-1002—Definitions.

"Document" means any document of title of goods.

"Goods" means any chattels, personal other than money, things in action, or things so affixed to land as to become a part thereof.

STATEMENT OF THE CASE.

The petitioner, Scott M. Brown, was indicted under Section 39-4226, Tennessee Code Annotated (47a-48a) (see also statement of Assistant Attorney-General, 47a-48a), in the Criminal Court of Hamilton County, Tennessee, on November 13, 1962, charging that on February 19, 1962, he did unlawfully, feloniously and fraudulently appropriate to his own use $13,400.00, the personal property of Chase Manhattan Bank and set out how it was done (2a, 3a). He was tried and convicted and sentenced to three years in the State Penitentiary (50a-51a, 51a-52a), and within the time allowed filed his motion for a new trial, (50a-51a, 51a-52a), which motion was overruled by the Trial Court on May 27, 1963, and the defendant was granted an appeal to the State Supreme Court and given sixty days in which to file his bill of exceptions and have it made a part of the record, which was done (52a-53a).

There were a total of seven indictments returned against the defendant, charging him with six additional offenses exactly like the case tried herein except as to dates, names and amounts (53a). The record herein does not show it, but petitioner here has since been tried on another one of these similar indictments and acquitted by the jury. The State, through the Attorney-General, moved to quash the other five indictments, which motion was sustained by the Trial Court and five additional indictments were returned by the Grand Jury against the defendant, under Section 47-1020, Tennessee Code Annotated (48a-49a), as we understand.

After petitioner's motion for a new trial was overruled he perfected an appeal to the Supreme Court of Tennessee, assigning errors, and the cause was duly heard and the judgment of the Trial Court was affirmed and

judgment of the Tennessee Supreme Court became final on April 30, 1964.

There were seven prosecuting witnesses—William T. Salter beginning at 4a; Winfield Baird at 6a; Eloise Thomas, 9a; Bernard J. Cassidy at 10a; Donald E. Wilding, 21a; William Dunstan, 21a and Ralph I. Reece, 23a. The testimony of Mr. Salter and Mr. Wilding is undisputed. None of the witnesses testified that the defendant, Scott N. Brown, got any of the money from the proceeds of the Salter note to the Commonwealth Life Insurance Company. It was undisputed that William T. Salter and wife, Margaret Jean Salter, on December 20, 1961, executed a deed of trust note to First Trust Company for $14,000.00, payable monthly, secured by deed of trust on their home in Cleveland, Tennessee, and this is filed as State's Exhibit 3. It is also undisputed that this note was never endorsed by First Trust Company, and that on February 13, 1962, it was endorsed to the Commonwealth Life Insurance Company as follows:

> "Without recourse on the undersigned, pay to the order of Commonwealth Life Insurance Company, this 13 day of February, 1962.
>
> First Trust Company,
>
> By: Scott Brown, *President.*"

and it is undisputed that this loan came from funds of First Trust Company and that on December 29, 1961, the mortgage was entered on the books as being receivable from Salter; and on January 2, 1962, a check for $12,900.64 was issued by First Trust to Phillips Real Estate Company, the agent of the Salters. (R. 232.) It is undisputed that Commonwealth Life Insurance Company of Louisville, Kentucky, on February 16, 1962, issued its check to First Trust Company for $27,292.38, which in-

cluded $13,453.99, the proceeds of the Salter note, as shown by State's Exhibit 16.

It is undisputed that State's witness, Winfield Baird, was the investment trust officer of Pioneer Bank and that he had occasion to handle mortgages for First Trust Company and handled the Salter mortgage, and he testified: "That this was actually a package of papers which came with the mortgage and supporting documents," and that he checked it over and actually made a deposit of $13,400.00 on January 29, 1962, to the credit of First Trust Company in the Pioneer Bank, as shown by State's Exhibit 8, and that on the same date, January 29, 1962, he mailed to Chase Manhattan Bank, State's Exhibit 7, request for that bank to credit the Pioneer Bank's account with $13,400.00 and that the stamp on this request, showing maturity date as July 31, 1962, was entered by Chase Manhattan Bank in New York. He also identified another deposit slip of the Pioneer Bank, dated February 17, 1962, State's Exhibit 9, showing a deposit of $45,152.47 to the credit of First Trust Company. He also testified that Chase gave Pioneer credit for the amount of the mortgage; that no check ever changed hands and the documents were kept in the Pioneer Bank, and that Pioneer had given First Trust credit for the instrument in Pioneer's money and charged it to Chase. Then Mr. Baird was asked:

> "After checking the documents, you gave First Trust $13,400.00; now that wasn't credit, that was money, that was a check?"

Mr. Baird answered:

> "We make a debit to Chase Manhattan's account and a credit to First Trust's account, at that time."

Then the witness testified as follows:

> "Q. And this was a money transaction wherein the money came from Pioneer to First Trust?

A. For the benefit of Chase Manhattan Bank.

Q. Just answer my question, sir.

A. Yes, we did.

Q. You did?

A. Yes.

Q. So that $13,400 was money of Pioneer Bank and given to First Trust, correct?

A. In the sense you are talking of, yes, sir.

Q. In the sense I am talking, that is the way the transaction happened. And then you all took a notice and sent it up to Chase that you had given $13,400 as these mortgage papers of your money to First Trust and they credited your account with $13,400?

A. Yes, sir.

Q. So what actually happened was, not what this indictment says, that Chase Manhattan Bank advanced on January 31 to First Trust Company $13,400, it didn't happen that way, did it?

A. Not specifically as stated." (8a.)

The gist of the testimony of Mrs. Thomas was that she signed State's Exhibit 10, reciting by check-mark "ALL DOCUMENTS," which was in effect the Salter papers and that they came to First Trust Company in that way. It is undisputed that Chase Manhattan Bank credited the account of Pioneer Bank with the sum of $13,400.00. (9a.)

The witness Bernard J. Cassidy testified that on January 31, 1962, the Pioneer Bank's account in Chase Manhattan was credited with $13,400.00 and read into the record at 11a an application of First Trust for $13,400.00, which had this provision:

> "It is addressed to the Chase Manhattan Bank, Chase Manhattan Plaza, New York 15, New York, advance number 1973, amount $13,400. 'We hereby apply for an advance of $13,400. to be made under the loan agreement between us, dated May 5, 1951, and our general loan and collateral agreement on file with

you: said advance to be repaid on demand, with interest at the rate of five and three-quarters per cent per annum, until the principal sum shall be paid.' " (12a.)

Mr. Cassidy admitted that the stamp on State's Exhibit 7 "maturity date due 7-31-62," was placed there by Chase Manhattan Bank. Then Mr. Cassidy testified:

"In other words, what actually happened was that they already had the money by the time this came down there, First Trust?

Only if Pioneer advanced it, a reimbursement from Chase.

Pioneer's bookkeeper testified that the money was put out on January 29, it was two days later before your credit note even got down there to Pioneer, wasn't it?

Yes, sir." (20a.)

It is undisputed that Ralph I. Reece is a qualified public accountant and had examined the books of First Trust Company and associate companies about May 1962, for the Trustee in Bankruptcy and had knowledge of the transactions, and that the defendant, Scott Brown, had made his personal records available to him and to the court. Then Mr. Reece testified further:

"Q. All right, sir, and so you are not here to present any evidence at all that this $13,400.00, as charged in this particular indictment, was appropriated by Scott Brown to his own use?

A. No, sir, I am not.

Q. And you couldn't do it, could you?

A. Not that specific money, no, sir.

Q. This period of this indictment here appears to be February 12, 1962, until the bankruptcy?

A. There were as result of our investigation, we determined that little or no funds were withdrawn directly from First Trust Company by Mr. Brown dur-

ing this period you refer to. There may have been a minor item or two, of a nature of reimbursement expense.

Q. What do you mean by minor?

A. $2.00, $20.00, $50.00—I don't think specifically of any, but our investigation indicated that there were no cash withdrawals, as we referred to them; that any such cash transactions of Mr. Brown and First Trust Company were in the nature of reimbursable expenses of relatively nominal amounts." (25a, 26a.)

Witness further testified that some time from January 1, 1962, to the bankruptcy on April 4, 1962, there was money transferred from First Trust Company and that Scott Brown had withdrawn from the other companies a total amount in excess of the Salter money.

Thereupon the defendant made a motion for a directed verdict in his favor for want of any evidence of guilt, which was overruled by the Trial Court.

The defendant testified in his own behalf, and it is undisputed, that First Trust Company had made it possible for 7500 families to purchase homes in the Chattanooga area; had made loans totaling $125 million, and had paid in interest to various banks $2 million; that there were a total of 55 employees and officers in his company and 25 or 30 outside employees; that it commenced doing business with Chase Manhattan about 1951 and that Pioneer Bank became the depository for Chase Manhattan in 1952, and that all of their money was handled by Pioneer, just as the Salter advancement was made; that he set up the policies of First Trust Company; that he did not appropriate $13,400.00 or any other amount and had never stolen a cent from any one; that there was more than $500,000.00 in the escrow accounts that he could have taken had he desired. (R. 216-217.) Mr. Brown tes-

tified that he did not destroy any collateral; that under the agreement with Chase Manhattan he could have thrown the Salter mortgage in the waste basket.

It is undisputed in the record that Mr. Brown proved a good character. (30a-46a.)

It is not in the bill of exceptions but is undisputed, as shown by the affidavits of Henry V. Grady, Attorney for Scott Brown; R. D. Elam, foreman of the jury and Tillman Grant, Trial Judge, that the indictment was not passed with the charge and papers to the jury. This question was raised in motion for a new trial and by assignment of error in the Supreme Court of Tennessee, but the court overruled this assignment, holding that the defendant had waived this failure on the part of the trial court, but we think the court concedes that it is the law, but should have been raised before the jury reported a verdict of "Guilty." (58a-60a.) The question that there was no evidence to support a verdict of guilt was first raised in the Trial Court on motion of the defendant, at the close of the State's proof, for a directed verdict in his favor. This question was again raised on motion for a new trial, and again raised in the Supreme Court by the first assignment of error, and again raised in the first and second petitions to rehear. The question of the Trial Judge's error in including in his charge statutes, which of course included Section 47-1020, Tennessee Code Annotated, was first raised by the defendant in the Trial Court, in Section 8 of his motion for a new trial, and again raised in his Assignment of Error IV in the Supreme Court, and again raised in the Supreme Court on the first and second petitions to rehear.

The Supreme Court, in its opinion overruling the second petition to rehear, concedes that Section 47-1020, Tennessee Code Annotated, had no application by stating:

"One of the arguments made in this petition is to the effect that the trial court erred in reading Section 47-1020, T. C. A. to the jury. This question was acted on in the original opinion on page 8 thereof. This Section makes the failure of a Trustee under a trust receipt transaction to turn over to the entruster the goods, etc., or to pay the entruster the proceeds from the sale of said goods, a fraudulent breach of trust. We held that the reading of this Code Section to the jury did not affect the matter in the least, even though the Section was not applicable to the charges made out in the indictment. Since this is merely a reargument of a question heretofore considered. which we still think was not erroneous, this contention is overruled." (79a.)

The Supreme Court, in its original opinion, quotes from the defendant's citing an incident that occurred after the jury had been out for two hours, as follows:

"Foreman—'On page 2 it reads, "Upon the happening of some event as provided in the instrument creating the trust relationship, what does that instrument refer to?"

The Court—'Well, I might state this. That the Court would like to further enlighten you, but under the rules of the Court, cannot give you any further oral instructions. It is mandatory that the Court give you a written charge and that is what the Court has done. The Court cannot give you any further instructions.

Foreman—'One other question. One item introduces the item 16, withdrawn, that had the 60-day clause in it. Shall we consider that or reject it?

The Court—'Well, it's up to the jury to decide the case.'

Foreman—'Thanks'." (65a-66a.)

Unquestionably, the defendant was indicted under Section 39-4226 of the Tennessee Code and was tried and convicted under Section 47-1020 of the Code, in violation

of the decisions of the Supreme Court of the United States, above cited, and of his Constitutional rights under the Fourteenth Amendment, and under the 6th Amendment to the U. S. Constitution.

Section 39-4226 has served the purpose of fraudulent breach of trust for more than 100 years, it being originally enacted in Tennessee by the Acts of 1855-1856 and brought into the Code of 1858.

As we understand, the 1963 Legislature has repealed Section 47-1020, Tennessee Code Annotated, effective at midnight, June 30, 1964. New Section 39-4237.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. We think unquestionably that this case comes within sub-section (a) of section 1, rule 19 of this Court, in that the Trial Court and the Supreme Court of Tennessee has decided a Federal question of substance and convicted the defendant of fraudulent breach of trust under Section 39-4226, Tennessee Code Annotated, when there is no proof to support such conviction, contrary to the decisions of this Court, particularly *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 77 S. Ct. 752; *Johnson v. State of Virginia*, 373 U. S. 61, 83 S. Ct. 1053; *Thompson v. City of Louisville*, 362 U. S. 199, 80 S. Ct. 624; the recent case of *Mary Hamilton v. State of Alabama*, S. Ct. Reporter Advance Sheet, April 15, 1964, page 982, and many others.

2. The Trial Court and the Supreme Court of Tennessee have charged the defendant, under Section 39-4226 of the Code and tried him under Section 47-1020 of the Code, which has no application to notes and mortgages but applies to automobile floor plans and similar financing, in violation of the decisions of this Court in the case of *De*

Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255 and *Cole v. Arkansas,* 333 U. S. 196; 92 Law Ed. 644 and many others.

3. We believe the decision of the Trial Court and the Supreme Court of Tennessee, holding that Scott N. Brown has not been deprived of his liberty or property without due process of law, in violation of his rights under the 14th Amendment to the Constitution of the United States, is a decision of a Federal question, which has not been heretofore determined by this Court, insofar as we have been able to find and which we believe should be determined by this Court and a holding that the defendant's Constitutional rights have been violated.

CONCLUSION.

WHEREFORE, and for the reasons set forth in this petition, it is respectfully submitted that this petition for certiorari should be granted and the ruling and judgment of the Trial Court and the opinion and judgment of the Supreme Court of Tennessee affirming the Trial Court, and adjudging the costs against petitioner be reversed and petitioner granted a new trial.

Respectfully submitted,

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Attorney for Petitioner, Scott N. Brown.

Certificate of Service.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have this day mailed a copy of the foregoing petition to Thomas E. Fox, Assistant Attorney-General, Supreme Court Office Building, Nashville, Tennessee, attorney for the respondent, State of Tennessee, with sufficient postage to deliver said copy.

THIS ____ day of July, 1964.

JOHN S. WRINKLE.

Supreme Court, U.S.
FILED
OCT 6 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

Docket No. 249

SCOTT N. BROWN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee.

JOHN S. WRINKLE,
1521 Hamilton National Bank Bldg.,
Chattanooga, Tennessee,
Attorney for Petitioner

THOMAS E. FOX,
Assistant Attorney-General,
Supreme Court Office Building,
Nashville, Tennessee,
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE 621-5047

INDEX TO PETITIONER'S APPENDIX.

Indictment 1a

Witnesses:

- Winfield Baird 6a
- Scott N. Brown 30a
- Bernard J. Cassidy 11a
- Character Witnesses 46a
- William Dunstan 21a
- Ralph I. Reece 24a
- William T. Salter 4a
- Eloise Thomas 9a
- Donald E. Wilding 21a

Tennessee Code Annotated—Charge to Jury 47a

Judgment of Trial Court 50a

Motion for New Trial 51a

Judgment of Trial Court Overruling Motion for New Trial and Granting Appeal 52a, 53a

Assignments of Error in Supreme Court of Tennessee 54a

Opinion of Supreme Court of Tennessee 61a

Judgment of Supreme Court of Tennessee 67a

Petition to Rehear 68a

Opinion of Supreme Court on Petition to Rehear 71a

Judgment of Supreme Court on Petition to Rehear 72a

Order of Supreme Court Permitting Second Petition to Rehear 73a

Second Petition to Rehear 73a

Opinion of Supreme Court on Second Petition to Rehear 78a

Final Judgment of Supreme Court Filed April 30, 1964 ..... 81a

Order of Supreme Court Staying Judgment Until Petition for Certiorari Is Acted Upon by Supreme Court 81a

PETITIONER'S APPENDIX.

MATERIAL PARTS OF RECORD IN THE TRIAL COURT.

PLEAS OF TERM. November 5, 1962.

STATE OF TENNESSEE,
COUNTY OF HAMILTON.

Pleas at a Criminal Court begun and held at the Court House in the City of Chattanooga, County and State aforesaid, on the first Monday of November, 1962, the same being the 5th day of said month.

Present and presiding the Honorable Tillman Grant, Judge of the Second Division of the Criminal Court, Sixth Judicial Circuit of Tennessee, duly elected, qualified and commissioned, when the following proceedings were had, to-wit:

INDICTMENT. November 13, 1962.

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

* * * * *

104179 State v. Scott N. Brown—Fraudulent Breach of Trust—

The Grand Jurors in a body on November 13, 1962, returned into open Court an indictment against defendant, endorsed, "A True Bill," W. O. Hubbuch, Foreman of the Grand Jury, State of Tennessee v. Scott N. Brown, Bernard Cassidy, Prosecutor, Filed November 13, 1962, CLYDE M. SANDERS, Clerk, as follows:

State of Tennessee, Hamilton County, Criminal Court, November 1962 Term,

The Grand Jurors for the State aforesaid, being duly summoned, elected, impaneled, sworn and charged to

inquire for the body of the County aforesaid, upon their oaths aforesaid, present:

That Scott N. Brown heretofore on the 19th day of February, 1962, in the County aforesaid, did unlawfully, feloniously and fraudulently appropriate to his own use the following described personal property, to-wit: Thirteen Thousand Four Hundred Dollars ($13,400.00), in good and lawful money of the United States of America, of the value of $13,400.00, the personal property of the Chase Manhattan Bank, a banking association, by the following means, to-wit: December 20, 1961, William T. Salter and wife negotiated with First Trust Company, a corporation, a mortgage in the amount of $14,000.00 on their property located at Forest View Drive, Cleveland, Tennessee, Scott N. Brown was President and Executive Head of the said First Trust Company and the policies and directions of said company were under the said Scott N. Brown's immediate supervision and control. On January 29, 1962, the said First Trust Company, under the direction of the defendant, Scott N. Brown, deposited with Pioneer Bank, a banking association in Chattanooga, Hamilton County, Tennessee, the mortgage documents securing the said loan. Upon notice from the depository, Pioneer Bank, that the said mortgage documents had been deposited, Chase Manhattan Bank advanced on January 31, 1962, to First Trust Company, Thirteen Thousand Four Hundred Dollars ($13,400.00). On February 12, 1962, the aforesaid mortgage documents were released to First Trust Company under a Trust Receipt. First Trust Company, acting through its President and Executive Head, Scott N. Brown, sold the aforesaid Salter Mortgage documents on February 19, 1962, to Commonwealth Life Insurance Company of Louisville, Kentucky, for Thirteen Thousand Four Hundred Fifty-Three Dollars and Ninety-Nine Cents

($13,453.99) and deposited the said proceeds to its own account. The proceeds from the sale of the Commonwealth Life Insurance Company of Louisville, Kentucky, were to be credited to the account of Chase Manhattan Bank for that purpose, and none other, and this the said Scott N. Brown well knew at the time he so received the said $13,453.99 from Commonwealth Life Insurance Company of Louisville, Kentucky. Scott N. Brown having received the said money for the purpose aforesaid, and not regarding his duty in this behalf, he, the said Scott N. Brown did, on the date and day aforesaid, and in the County aforesaid, unlawfully, feloniously and fraudulently convert and appropriate the said money to his own use, against the peace and dignity of the State.

/s/ W. O. Hubbuch, Foreman
/s/ Edward A. Rogers
/s/ Newell E. Cleghorn
/s/ Joe Haynes
/s/ L. D. Walls
/s/ Carl Angle
/s/ U. S. Bynes
/s/ Susie Sparks Bynum
/s/ R. E. True
/s/ Mrs. C. H. Cobleigh
/s/ D. A. Butler
/s/ Barbara K. Bradshaw
/s/ J. B. Buttram
/s/ Robert C. Harris

(R. 4-5)

* * * * *

Thereupon Court adjourned until tomorrow morning at 9:13 A. M.

/s/ TILLMAN GRANT,
Judge.

PROCEEDINGS. Chattanooga, Tennessee
May 16, 1963

BE IT REMEMBERED, the above entitled cause came on for hearing on this date, before the Honorable W. Tillman Grant, Jr., Judge of Division Two of said court, when all parties announced ready for trial.

WHEREUPON, the following proceedings were had and evidence introduced, to-wit:

A jury was duly impaneled, examined, accepted and sworn.

The witnesses were sworn and placed under the rule.

The indictment was read and defendant pleaded not guilty.

THEREUPON, the following evidence was introduced on behalf of the State:

The witness, **William T. Salter,** testified—and this is undisputed—that he and his wife, Margaret Jean Salter, made application to First Trust Company for a loan of $14,000.00, and on December 22, 1961, they executed a deed of trust on their Cleveland, Tennessee, home to secure payment of the following described note, which are filed as State's Exhibit No. 3:

DEED OF TRUST NOTE.

Cleveland, Tennessee
December 20, 1961.

$14,000.00.

For Value Received, the undersigned promise(s) to pay to First Trust Company, or order, the principal sum of Fourteen Thousand and No/100 Dollars ($14,000.00), with interest from date at the rate of five and one-fourth per centum (5¼%) per annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of First Trust Company in Chattanooga, Tennessee, or at such other place as the holder may designate in writing, in monthly installments of Seventy-seven and 42/100 Dollars ($77.42), commencing on the first day of February, 1962, and on the first day of each month thereafter until the principal and interest are fully paid, except that the final payment of principal and interest, if not sooner paid, shall be due and payable on the first day of January, 1992.

If default be made in the payment of any installment under this note, and if the default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default. In the event of default in the payment of this note, and if the note is collected by an attorney at law, the undersigned agree(s) to pay all costs of collection, including a reasonable attorney's fee.

The maker(s) and endorsers severally waive presentment, protest and demand, notice of protest, demand and of dishonor and nonpayment of this note, and expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way affecting the liability of the maker(s) and endorser(s) hereof.

This note is secured by a Deed of Trust of even date herewith, duly recorded in the Register's office, County of Bradley, State of Tennessee, conveying real estate located in said county.

WILLIAM T. SALTER

MARGARET JEAN SALTER

THIS IS TO CERTIFY that this is the note described in and secured by Deed of Trust of even date herewith, and in the same principal amount as herein stated, to Realty Title Company, Trustee(s), on real estate located in Bradley County, Tennessee.

Dated the 22 day of December, 1961.

J. Y. ELLIOTT

Notary Public

(Seal)

My commission expires on the 18 day of January, 1965.

It is undisputed that the above note, State's Exhibit No. 3, was endorsed on the back as follows:

"Without recourse on the undersigned, pay to the order of Commonwealth Life Insurance, this 13 day of February, 1962.

FIRST TRUST COMPANY
By SCOTT N. BROWN,
President"

and that it was delivered to Commonwealth Life Insurance of Louisville, Kentucky, and that that Company, on February 16, 1962, paid to First Trust Company $27,292.38, which included $13,453.99, proceeds of the sale of the William T. Salter note, shown by State's Exhibit No. 16, and that that check was deposited in due course to the account of First Trust Company in the Pioneer Bank, Chattanooga, Tennessee, as shown by the testimony of the witness Donald E. Wilding. (Record—pp. 136-148.)

The prosecuting witness **Winfield Baird** (R. 49-79) testified, in substance, that he is a banker, being investment trust officer for the Pioneer Bank in Chattanooga, Tennessee, and that he had occasion to handle mortgages for First Trust Company, Pioneer Bank and Chase Manhattan Bank, and that he handled the William T. Salter mortgage; that this was actually a package of papers which came with the mortgage and supporting documents, and that he would check them over, to make sure they included the proper papers and seemed to be in order, and it was agreed (R. 52) that all original papers would be introduced and then withdrawn and photostat copies substituted therefor.

Thereupon, the witness Baird identified instrument dated January 29, 1962, which was a deposit certificate signed by Pioneer Bank, W. M. Baird, Vice-President, reciting: "Please credit our account at the head office of

Chase Manhattan Bank with the amount of $13,400.00, representing the above advance made to First Trust Company by us," which was filed as State's Exhibit No. 7 to the testimony of Winfield Baird, and that the mortgagor in this case was William T. Salter.

Mr. Baird also identified a deposit slip, as State's Exhibit No. 8, from First Trust Company to Pioneer Bank, dated January 29, 1962, note of William T. Salter, $13,400.00, and that this deposit was to First Trust Company's Special Account 110 and numerical number, which all accounts have, 000-0469.

Thereupon, Mr. Baird identified another deposit slip in the Pioneer Bank, dated February 17, 1962, for $45,152.47, which was filed as State's Exhibit No. 9 to his testimony.

Thereupon, Mr. Baird identified a receipt signed "First Trust Company, by Eloise C. Thomas, Assistant Secretary," receipting the Pioneer Bank, referring to the William T. Salter securities, and the instrument is check-marked "All Documents" and dated February 12, 1962, which is filed as State's Exhibit No. 10. Then Mr. Baird stated that after the documents were removed they had never been returned to the Pioneer Bank, nor had the Pioneer Bank received the proceeds, and that the Salter note had never been paid. On cross-examination Mr. Baird admitted that First Trust Company is a corporation and there is nothing in the receipt relating to the defendant Scott Brown Mr. Baird also admitted that it was just a matter of credit; that Chase gave Pioneer credit for the amount of the mortgage, that no check ever changed hands and the documents were kept in the Pioneer Bank, and that Pioneer, in the meantime, had given First Trust credit for the instruments in Pioneer's money and this was charged to Chase.

Then Mr. Baird was asked:

"After checking the documents, you gave First Trust $13,400.00; now that wasn't credit, that was money, that was a check?"

Mr. Baird answered:

"We make a debit to Chase Manhattan's account and a credit to First Trust's account, at that time."

Then the witness testified as follows:

"Q. And this was a money transaction wherein the money came from Pioneer to First Trust?

A. For the benefit of Chase Manhattan Bank.

Q. Just answer my question, sir.

A. Yes, we did.

Q. You did?

A. Yes.

Q. So that $13,400 was money of Pioneer Bank and given to First Trust, correct?

A. In the sense you are talking of, yes, sir.

Q. In the sense I am talking, that is the way the transaction happened. And then you all took a notice and sent it up to Chase that you had given $13,400 on these mortgage papers of your money to First Trust and they credited your account with $13,400.

A. Yes, sir.

Q. So what actually happened was, not what this indictment says, that Chase Manhattan Bank advanced on January 31 to First Trust Company $13,400; it didn't happen that way, did it?

A. Not specifically as stated."

Thereupon the witness Baird admitted that the certificate of deposit does not tie in with the date of the indictment, January 31, 1962, but that the deposit was made on January 29, 1962, and was for $13,400.00, representing the advance made to First Trust by the Pioneer Bank.

Thereupon the witness admitted that the certificate of deposit dated January 29, 1962, and stamped "Maturity

Date (Due) 7/31/62" was not placed on there by him at the Pioneer Bank, but was placed on it by Chase Manhattan Bank in New York, after the witness had mailed the certificate—State's Exhibit No. 7—to Chase Manhattan Bank. (R. 62-63.)

Thereupon the witness admitted that this procedure had taken place many times and for seven or eight years and was not any new thing or anything unknown to Pioneer or to Chase or to First Trust, and that this continued right on up to the bankruptcy of First Trust Company; that there were many such mortgages and they had always received a check from First Trust within six months and then Pioneer credited Chase Manhattan and Chase Manhattan charged Pioneer with the amount collected, reversing the cycle, and the witness said that the bankruptcy occurred around April 1, 1962, and admitted that First Trust had always paid Pioneer monthly on the mortgages. Witness further admitted that Chase Manhattan was familiar with the operation, the procedure wherein First Trust deposited with Pioneer mortgage documents and Pioneer advanced money to First Trust, and First Trust later paid back with their own check to Pioneer. (R. 78.)

The next prosecuting witness, **Eloise Thomas**, testified that she was employed for a number of years at First Trust prior to their bankruptcy; that she worked in the closing department and in the shipping department and that her department closed loans and shipped loans to permanent investors and that she was at the head of the department, and that Mr. Brown was her boss and she worked under his directions; that Pioneer Bank, Chase Manhattan Bank and Hamilton National Bank were temporary lenders, and that on February 12, 1962, she signed State's Exhibit No. 10, which was a receipt from First

Trust Company, by Eloise C. Thomas, Assistant Secretary, receipting the Pioneer Bank by checkmark "All Documents," relating to the William T. Salter Loan, and that she gave this receipt to Mr. Brown and later she got the documents on the Salter loan and they were given to a girl to place in the file, to send to a permanent investor, and that First Trust Company had already received money from the temporary lender some time before, and the witness identified her transmittal letter, which is filed as State's Exhibit No. 12, showing all the matters relating to the William T. Salter and wife loan, and that this went to the Commonwealth Life Insurance Company of Louisville, Kentucky, and that she wrote on this, under remarks, "Make check payable and mail to First Trust Company, 709 Chestnut Street, Chattanooga, Tennessee," and that the trust receipt recited, "We agree to payment on receipt of remittance from our investor or return the document to you."

On cross-examination the witness said she did not work in the Accounting Department; was not too familiar with the payments, and that this process had been going on since she worked in the shipping department, from about 1957, and that as Secretary of First Trust she was familiar with the procedure, and that the checks always came payable to First Trust Company and she had put that instruction on Exhibit 12, to make the checks payable to First Trust Company, by the direction of Mr. Brown; that he was in charge and that she could have transferred funds from First Trust's account 110 to any other account but did not remember any special case; that First Trust was a corporation and she was Assistant Secretary; that this company had auditors and had a legal department and lawyers to advise them.

The next prosecuting witness was **Bernard J. Cassidy.** Mr. Cassidy testified that he is Assistant Vice-President of the Chase Manhattan Bank in New York and has been with the Bank since 1928 and was familiar with the transaction between Chase Manhattan and First Trust Company of Chattanooga, and that his first connection with the so-called Salter loan was when it was placed as collateral for the loan; that Chase Manhattan Bank received a request for an advance, as it was called, and they got the information from an instrument signed by First Trust Company and certificate executed by the Pioneer Bank, saying that the advance was in order. The witness was shown what had been identified as State's Exhibit No. 7 to the testimony of Winfield Baird and the witness testified that this would have to come to Chase Manhattan at the time the advance was requested, and together with the other, they formed a unit and authorized Chase to advance $13,400.00, and he said that these were accounts and he brought them down, and that originally they came from the Pioneer Bank, and the reason he received them was that the Pioneer Bank was the depository for Chase Manhattan in Chattanooga, which took in the collateral, examined it, held it and told Chase that it was in order for Chase to make an advance, and that Pioneer held the mortgage as collateral; that he did not think the writing and stamp were on the certificate of deposit when it came to Chase but was put on some time later. He said further:

> "I can tell that this $13,400 is taken from this $13,400 and the 'see next page' I would say referred to this instrument which the two together, well, when we got these two, we would have made the advance"

and Mr. Cassidy said he would identify the other sheet, and it was filed as State's Exhibit No. 13. Then Mr. Cassidy testified as follows:

"A. I think I know now why it said see next page on that, because this particular advance, the advance on this mortgage was part of a bigger advance, I think it was $53,000, secured by about five mortgages, and that would have told somebody that there was not one mortgage, that they should have three of those other certificates.

Q. These two papers are the ones that referred to the Salter mortgage?

A. The Salter mortgage, yes.

Q. Will you please for the record read this instrument?

A. It is addressed to the Chase Manhattan Bank, Chase Manhattan Plaza, New York 15, New York, advance number 1973, amount $13,400. 'We hereby apply for an advance of $13,400 to be made under the loan agreement between us dated May 5, 1951, and our general loan and collateral agreement on file with you; said advance to be repaid on demand, with interest at the rate of five and three-quarters per cent per annum, until the principal sum shall be paid.

As a further inducement to you to make this advance, we hereby certify:

A. We are in all respects entitled to such advance under the terms of the aforesaid agreement.

B. All the papers required on the above agreement, and more particularly described in Article Fifth thereof, have been delivered to you for each mortgage set forth on the annexed schedule and are hereby acknowledged to have been pledged as security for all advances heretofore or hereafter made pursuant to the agreement.

C. Each bond and mortgage now held by you to secure this loan is a valid lien of the dignity required by the aforesaid loan agreement on the property mentioned therein, for the full unpaid balance thereof and is not in default.

D. Each bond and mortgage pledged to secure this loan is identified as insured by the Federal Housing Administration or as guaranteed by the Veterans Administration, and is eligible for insurance or guaranty, as the case may be, to the full extent required by the aforesaid loan agreement, all conditions of such insurance or guaranty having been fulfilled.

E. Each bond and mortgage pledged as security hereunder complies in all respects with the conditions of the commitment for the purchase.

F. There exists no default in the observance or performance by us of any agreement or condition contained in the said agreement by us to be observed or performed or breach of any of our representations or warranties thereunder.

Signed, First Trust Company, and it is attested and dated."

Q. Who signed that agreement or that application?

A. Scott N. Brown, President, witnessed by Betty Wheil, Assistant Secretary, dated at Chattanooga, Tennessee, this 29 day of January, 1962.

Q. Then is it a fair statement to say that, simply speaking, this is an application by Scott Brown, as the President of the First Trust Company, as a loan on the Salter property?

A. Yes.

Q. To whom was this application made?

A. It was made to Chase Manhattan and delivered through Pioneer.

Q. Was Pioneer acting as your agent in these type transactions?

A. No, there was no agency.

Q. What was the relationship between Chase Manhattan Bank and Pioneer Bank in these?

A. Well, Pioneer is, and has been, a correspondent bank of Chase's. In this particular situation

Pioneer had agreed to act as depository, which meant they would take in the mortgage packages, examine them, hold them, tell us that the package was in order, call on us to make the advance, the loan, and then we would respond by requesting Pioneer Bank for the account of First Trust Company, and then Pioneer would hold the collateral, they were permitted to deliver it on trust receipts to First Trust Company for purposes of sale to a permanent mortgagee, collect the proceeds and repay our loan.

Q. Are you familiar with the warehousing agreement?

A. Yes.

Q. Between Chase Manhattan, Pioneer and First Trust?

A. Yes.

Q. Who negotiated that agreement, if you know?

A. I don't know but I would say it was probably Mr. O'Keefe or Mr. Brewer, who was with us at the time, I can't say for sure.

Q. On behalf of Chase Manhattan?

A. At that time it was Chase National Bank, back in 1955.

Q. And who in that negotiation which resulted in that agreement represented Pioneer Bank?

A. In the original negotiation Pioneer was not involved, in the original negotiation the depository was Hamilton National.

Q. When was that changed?

A. About 1957 or '58, somewhere in there.

Q. At the time of the change do you know who represented Pioneer Bank?

A. No, I don't.

Q. Do you know who represented First Trust Company?

A. No, I was not in on the transaction.

Q. Do you have a copy of the agreement involved?

A It is down here, yes."

Mr. Cassidy further testified that after this application for the money on the Salter property Chase Manhattan credited Pioneer Bank, for the account of First Company, with $53,200.00 and that $13,400.00 of this was applicable to the Salter property, and he was asked to explain that type of transaction to the jury and he answered:

> "A. Well, it is a convenient way of transferring money. Pioneer Bank has an account with Chase Manhattan Bank, just as anybody else might have, and then in turn First Trust Company had an account with Pioneer Bank, so that we could pass these funds down to Chattanooga by crediting on our books the account of Pioneer Bank and then Pioneer—then we send an advice to Pioneer that we had done this, then Pioneer would charge their account at Chase and credit First Trust Company's account at Pioneer.
>
> It was a bookkeeping way of transferring money from New York to Chattanooga.
>
> Q. Whose money was involved in the lending?
>
> A. Chase Manhattan's.
>
> Q. Did Pioneer ever lend any money in this thing, of their own money?
>
> A. I don't know whether there was a separate transaction with Pion er, but the transaction we are talking about was 100 per cent Chase Money."

Mr. Cassidy further stated that after it was all over Chase Manhattan lost the money on the Salter property; that Chase Manhattan looked over the financial statements of First Trust Company as they were prepared each year; that Chase Manhattan loaned $13,400.00 and the money had not been repaid; that neither Chase nor the Pioneer Bank received the mortgage instruments. He further said that the money was transferred from Chase Manhattan to Pioneer on January 31, 1962.

Thereupon Mr. Cassidy testified further:

"Q. May I see the record you are referring to that indicates that. Will you for the record identify this piece of paper, Mr. Cassidy?

A. It is one of our routine internal papers, it is part of a thing of about five or six copies. The first one would have gone either to Pioneer or First Trust Company; the second one would go to the other, Pioneer or First Trust Company; another copy goes to our bank bookkeeping department, which would have credited the account of Pioneer. Another copy, this copy, goes to the real estate bookkeeping department to increase loans collateral.

Q. All right, now what is it?

A. Credit advice.

Q. Is it the authorization to advance the money to First Trust?

A. Yes, sir.

Q. Will you introduce that as an exhibit to your testimony?

A. Yes, I can leave it."

Whereupon, said credit advice was received in evidence and marked State's Exhibit No. 14.

Thereupon, Mr. Cassidy stated that this exhibit does not show how much went for the Salter property; that it shows a credit of $53,200.00 made on the pledge of five mortgages and that he knew that Salter was one of them, and that the loan number was 1973 in Chase Manhattan, which is reflected on the exhibit and would cover the Salter mortgage, and that Chase Manhattan would have nothing to do with it if their money had been repaid.

On cross-examination Mr. Cassidy stated that he was in the Trust Department from 1928 until 1945, when he came into the real estate department as a lawyer, and that up to about 1957, or 1958, he was head of the legal division of the real estate department, and then went into the supervision of mortgage loans and that at the present

time he was doing work that originates primarily with the supervision of warehousing loans; that he is an attorney and his title is Assistant Vice-President of Chase Manhattan; that he was in error in saying that Betty Wheeler was a witness to Exhibit 13, that it says "Assistant Secretary," and that it was actually signed by both Mr. Brown and Betty Wheeler and that the stamp on this exhibit has a maturity date of July 31, 1962, and that the loan agreement provided that any one of these advances, any mortgage, could remain in pledge for a maximum period of six months; and that July 31, 1962, would be six months later than the date on which the money was advanced, January 31, 1962; that First Trust Company collapsed about April 1, 1962, and that the remainder of February and March would actually be less than sixty days.

Thereupon, Mr. Cassidy further testified:

'Q. So at the period of time covered by this indictment, certainly no default in the mortgage existed up until the time of the bankruptcy?

A. That was the maximum control period.

Q. Yes, I understand.

A. There were other conditions which shortened that period.

Q. But you didn't, over the period of many, many years that you dealt with First Trust there, you didn't feel called upon or your company didn't, to pursue any sixty day mortgage prosecution?

A. That sixty day period refers to the trust receipts.

Q. In other words, the mortgage wouldn't even have been questioned if this company hadn't gone bankrupt until the six months period had gone by?

A. Well, there would have been no way we could have known of anything. The Pioneer was not

advised—was not required to advise us when they released a mortgage on trust receipts.

Q. Well, as I understand it, I am not trying to cause any confusion, if this company had not gone bankrupt, would your company have paid any attention to the mortgage until the six months period had gone by?

A. Under the practical circumstances, no.

Q. That's right. So the only thing that actually caused any default in the mortgage here at all was that the corporation that had the money went into bankruptcy?

A. No, there was another condition there.

Q. Sir?

A. There was another condition there.

Q. Isn't that what caused the default, where the money went?

Mr. Davis: You may answer him if you know.

A. What?

Mr. Davis: You may answer him if you know.

A. Well, it was the sale of the mortgage to the permanent investor which would have been the controlling factor in shortening this six months period, the sale of the mortgage to the investor made the payment to us automatically due at that time.

Q. I understand that I am not dealing in probabilities or possibilities, just what actually is, and the reason the mortgage was not paid off was the fact that First Trust that had the money to pay it went bankrupt or didn't have the money, they went bankrupt, didn't they?

A. Yes, sir, a month after the sale.

Q. Yes, sir, a month after the sale. And otherwise the six months period would have gone on by and in the routine that you all followed for many years, the First Trust would have paid off Pioneer and there would have been no question about, would there?

A. I suppose that would have happened."

Thereupon Mr. Cassidy further testified:

"Q. Mr. Grady: Now, Mr. Cassidy, I am not trying to be technical, am just trying to find out which money the Chase claimed was theirs that was appropriated. This indictment charges this man with appropriating $13,400 of the money of the Chase National Bank to his own use and it states he did it in this way, by the following means:

'December 20, 1961, William T. Salter and wife negotiated with the First Trust Company, a corporation, a mortgage in this amount on their property located in Cleveland, Tennessee, Scott Brown, as executive head and president of First Trust Company, and following the directions of said company under the said Scott Brown's immediate supervision and control.

'On January 29, 1962, the said First Trust Company, under the direction of the defendant, Scott Brown, deposited with Pioneer Bank, a banking association of Chattanooga, the mortgage documents to secure said loan. Upon notice from the depository, Pioneer Bank, that the said mortgage documents had been deposited, Chase Manhattan advanced on January 31, 1962, to First Trust Company, $13,400.00.'

Q. That is what I am interested in. I want to see where Chase Manhattan advanced on January 31 to First Trust Company, $13,400 like this indictment says. Not being technical, I just want to see that proof.

A. The only proof I can offer you is that yellow sheet which is in testimony there, which is our internal credit—

Q. This yellow sheet is State's Exhibit 14, and it is dated January 31, 1962, and it is in the amount of $53,200. and it is addressed and mailed to Pioneer Bank and says attention Mr. Ingle, Vice-President & Trust Officer, and it states advance to First Trust

Company, as per certificate of deposit dated January 29 this amount of money.

In other words, what actually happened was that they already had the money by the time this came down there, First Trust.

A. Only if Pioneer advanced it, a reimbursement from Chase.

Q. Pioneer's bookkeeper testified that the money was put out on January 29, it was two days later before your credit note even got down there to Pioneer, wasn't it?

A. Yes, sir.

Q. What actually happened was, that they got the money, not from Chase but from Pioneer, and then Chase reimbursed Pioneer.

A. It could have happened that way, another—well it could have happened that way.

Q. It did happen that way, didn't it? So which $13,400. belonged to your bank?

A. This.

Q. This which went to Pioneer?

A. To Pioneer, for the account of First Trust Company.

Q. That's right. Now, is there any $13,400. transaction where the money of Chase National Bank went directly either to First Trust or to Scott Brown?

A. Well, it went to the account of First Trust Company at Pioneer.

Q. Yes, but it actually went to Pioneer. Now, you are a lawyer, Mr. Cassidy, you know that a criminal indictment has got to be specific as to what happened, don't you?

A. Yes, sir.

Q. And that is the way it really happened, isn't it?

A. I don't know what happened in Chattanooga.

Q. But all you can testify to is that—

A. Is that we advanced the money on January 31.

Q. To Pioneer on the 31st of January and you don't know whether or not Pioneer had given the money two days before that to First Trust, do you?

A. I would say that if Pioneer advanced the money, I am wondering how they—on what theory they did it, because the mortgage was delivered to Pioneer as security to Chase.

Q. Yes, sir, you all had a little trouble over that, but I am just talking about what did happen.

A. I know we credited Pioneer on January 31.

Q. That's all, no, just a second, that is all on that subject.

A. Uh-huh.

Q. Have you all ever given Scott Brown, personally, any advance of $13,400.00?

A. Not to my knowledge.

Q. In other words, the dealings have been with First Trust?

A. Yes, sir."

Then Mr. Cassidy finally stated that it was since 1951 they had been dealing with First Trust in the manner above outlined. (R. 95-128.)

From Line 25, page 128 of the record to adjournment, the jury was in the jury room and did not hear the testimony until the Morning Session, May 17, 1963, 9:20 A.M., beginning at the bottom of page 135 of the record.

The State's next prosecuting witness was **Donald E. Wilding** and his testimony is in Record, pp. 136-148, and the substance of it is stated at 6a and is undisputed.

The State's next prosecuting witness was **William Dunstan**, Record 148-163, who said that he was employed by First Trust Company for eight years and was Vice-President and Manager, Mortgage Loan Department; that he had close business relations with the defendant, Scott Brown, and that Mr. Brown personally handled the bank-

ing transactions for First Trust and that Account 110 was the account of First Trust Company in the Pioneer Bank; that there was a great flow of money into this account resulting from the business operations of First Trust and payments from mortgage loans went through there or could have gone through some other bank account; that this particular account was used to deposit money resulting from such loans as the Salter loan and that he did not handle any of the money transactions or deposits or removal from that account, and that was handled under Mr. Brown's direction; that he (Dunstan) was an officer in the Real Estate Management Company and Interstate Mortgage Company and he did not have any personal knowledge that there were interchanges of money between First Trust and the other operating companies; that he was employed there when the Salter transaction was handled and had the original ledger sheet in his possession on payments made by Salter to First Trust Company, and that on February 5, 1962, Mr. Salter made a payment of $99.00, which was broken down for taxes and insurance, $21.58; interest $61.25 and principal $16.17, and that on March 19, 1962, that was paid the Chase Manhattan Bank, and that he was talking about State's Exhibit No. 11, which Exhibit is disbursements on Chase Manhattan on loans which were warehoused with them, reflecting payments to interest and principal after the payment had been collected from the mortgagors and was sent from First Trust and Pioneer Bank to Chase Manhattan. That on March 2, 1962, Mr. Salter made a payment of $99.00 and the record showed that on March 12, 1962, First Trust remitted to Commonwealth Life Insurance Company, and that the distinction between the Chase Manhattan loan and Commonwealth Life Insurance Company was that Chase Manhattan merely made a temporary

loan and that Commonwealth was a permanent investor; and that as head of the Mortgage Loan Department it was his understanding that when a permanent investor had been secured and the money received, the temporary investor would be paid off, which was the normal course of business in the mortgage loan business and he did not know of anything occurring to prevent this.

On cross-examination Mr. Dunstan stated he came to First Trust in 1954, and prior to that lived in Greenville, South Carolina, though he was born in England; that he worked for the Bank of New York in New York from 1930 to 1950; that he was not a stockholder in any of the Brown companies except First Trust Company.

Witness further stated that the Mortgage Loan Department submitted to Commonwealth Life Insurance Company the note in the ordinary course of business and that this sale could have been made even though Mr. Brown were in Miami; that Mr. Brown took care of the banking and that he (Dunstan) had no knowledge as to how the checks were handled or what disposition was made of the money. Witness further stated that there were a number of corporations and they all had a board of directors.

Witness further stated that First Trust Company loaned the money on the Salter mortgage; that in the Salter mortgage First Trust was named as the mortgagee and that First Trust sold it to Commonwealth in Kentucky and he imagined the check came to First Trust; that he was mainly in production, going out and seeking mortgages and contacting investors to buy them.

On further examination the witness stated that Mr. Brown was responsible for collection and disbursement of the money and that if anybody else had anything to do with it he was under Mr. Brown's direction.

The State's next prosecuting witness was **Ralph I. Reece**, who testified that he is a certified public accountant and the defendant admitted his qualifications, and that his firm, Hazlett, Lewis & Bieter and the firm of Ernst & Ernst were engaged to carry out an examination for the Trustee in Bankruptcy of First Trust Company; that this engagement was in April or May, 1962, and that he personally and other accountants made an examination of the books. That his examination showed that First Trust Company had voting and non-voting stock outstanding and that the voting stock is generally referred to in speaking of control of the company; that Scott N. Brown and his immediate family owned 39.3 per cent of the outstanding voting stock of First Trust Company; that Chattanooga Realty Company owned 30.2 per cent of the voting stock; that Interstate Realty Company owned one-half of one per cent of the voting stock, and various others, each owning less than ten per cent, owned a total of 30 per cent of the voting stock, and that the defendant, Scott Brown, owned 100 per cent of the stock of Chattanooga Realty Company and whatever voting power the Chattanooga Realty Company had in First Trust Company was actually Scott Brown's voting power; that Mrs. Scott Brown owned 100 per cent of Interstate Realty Company and that thus the effective control by Scott Brown of First Trust Company was 70 per cent of the voting stock on April 4, 1962, the date of the bankruptcy, and that it was not possible to trace specific money through the type of transactions that were involved between First Trust Company and all the affiliated companies.

Witness further identified a receipt from First Trust Company's records, filed as State's Exhibit No. 18, showing that on January 29, 1962, $13,400.00 had been received by First Trust Company from the Pioneer Bank (Chase) and deposited in Account 513, and the receipt is marked

First Trust Company, by B. W., meaning Betty Wheeler, who was an assistant secretary, and under remarks is William T. Salter. Then the witness was shown another accounting copy of First Trust Company, which also had been taken from the records of First Trust Company in the hands of the Trustee in Bankruptcy and showed $13,453.99 received from Commonwealth Life Insurance Company for the Salter loan, which receipt is dated February, 1962, which was filed as State's Exhibit No. 19, both relating to the Salter property.

On cross-examination the witness testified that this did not refer to money but was credit—that it was not dollars; that this receipt showing $13,453.99, purchase from Salter loan, he did not think was Mr. Brown's signature.

Witness further testified that he audited the books as best he could but it was not really technically an audit in the sense an audit is generally spoken of, as being an examination conducted in accordance with generally accepted auditing standards; that the investigation of the books and records of First Trust Company and affiliated companies, of certain transactions which came to his attention in the records and an investigation to answer certain questions which had been raised before the Trustee and Referee in Bankruptcy of First Trust Company—that this was the purpose of the examination.

Witness further stated that Mr. Brown made his personal records available. Then Mr. Reece testified further:

"Q. All right, sir, and so you are not here to present any evidence at all that this $13,400.00, as charged in this particular indictment, was appropriated by Scott Brown to his own use?

A. No, sir, I am not.

Q. And you couldn't do it, could you?

A. Not that specific money, no, sir."

Thereupon the witness further testified:

"Q. This period of this indictment here appears to be February 12, 1962, until the bankruptcy?

A. There were as result of our investigation, we determined that little or no funds were withdrawn directly from First Trust Company by Mr. Brown during this period you refer to. There may have been a minor item or two, of a nature of reimbursement expense.

Q. What do you mean by minor?

A. $2.00, $20.00, $50.00—I don't think specifically of any, but our investigation indicated that there were no cash withdrawals, as we referred to them, that any such cash transactions of Mr Brown and First Trust Company were in the nature of reimbursable expenses of relatively nominal amounts."

Thereupon, the witness further testified that from January 1, 1962, to the date of the bankruptcy there were transferrals of money from First Trust Company to the other allied companies and that there were substantial withdrawals to Scott Brown from the other companies, in excess of the Salter money.

On further cross-examination, the witness said these companies did business back and forth and there were approximately nine or ten of the companies, and that certain companies had legal counsel and he knew that certain of the companies had accountants retained, and they had a board of directors, but that he was not completely familiar with the board of directors of the various companies; that he had done work for some of them and these companies, like any other company, had various purposes and transacted business with one another, and that there was always a large amount of money moving among these companies and that the $13,000.00 could not be identified any more than any other specific sum of money.

On further direct examination the witness testified

that he had been employed prior to the bankruptcy by First Trust Company, Real Estate Management, Inc. and Interstate Mortgage Company to do work and that Scott N. Brown, the President and Treasurer employed him and that he was never employed by the Board of Directors, and that he reported the audit to Scott N. Brown; and after the jury had been excused and returned, the witness testified that the home office of First Trust Company was 709 Chestnut Street, in Chattanooga, Hamilton County, Tennessee, and that the Pioneer Bank is located in Hamilton County and that all the transactions with First Trust Company and Pioneer Bank were in Hamilton County (R. 163-188).

After the re-cross examination of Bernard Cassidy, the State having closed its case, the jury retired to the jury room and the defendant, through his counsel, Mr. Grady, made the following motion:

> "I would like to make a motion to request the Court to direct a verdict of not guilty for this defendant, on the basis that the State by their testimony has completely and totally failed to prove the material allegation in this indictment.
>
> "The first allegation here is that he feloniously and fraudulently appropriated for his own use the following described personal property: to-wit, $13,400 in good and lawful money of the United States of America in the value of $13,400 personal property of the Chase Manhattan Bank, a banking association, by certain means.
>
> "Now, of course, their proof has fallen completely on the proposition that he appropriated the money to his own use, which is really the material allegation in their indictment. They have not shown anywhere that Scott Brown, either directly or indirectly in any manner received one penny of this particular sum of money which they say in this indictment.

"If they had wanted to go into a proposition that would charge him with a round about way of receiving some of this money, they had the help of numerous bookkeepers and a great deal of time and all of the other people involved in this thing, and they should have set out definitely the way that he went about taking this money for his own use.

"They haven't done a thing except trace it to First Trust Company and their own witness has said that he received from First Trust Company nominal amounts of $15.00 or $20.00.

"They have woefully fallen short on their proof on the first thing. If they are going into the second grounds for the motion, it would be that they had not identified the home owner of the personal property. There are many cases, I haven't traced them up for recent rulings, but Your Honor knows it has always been very important in criminal law to state the owner of the property correctly or it becomes fatal, and in this case they did not correctly state the owner of the property.

"The next ground for their motion is that if they are going to rely on a breach of a contract as a fraudulent breach of trust on the part of Mr. Brown, they would have to prove their contract and no contract has been introduced or proven here today. That would be just elementary.

"Also, there are great variances in the proof and the wording of the indictment. For instance, they have—what actually happened by all of the testimony was that on this money that Pioneer gave to First Trust, and then Chase reimbursed Pioneer, and in other words, there was an agency proposition or a third party proposition working in there and if they are going to charge that the money was transferred by an agency, they have to set up an agency. If they don't, an indictment, if they don't you can just go afield for ever and ever and never allege anything exactly.

"They also allege that William Salter and wife negotiated with First Trust Company, a corporation, and their testimony was they negotiated with Phillips, an outfit in Cleveland, who acted as an agent perhaps for First Trust, but that is not set up in the indictment, so you don't know whether they claim that this particular branch of that act was done by agency or how it was done, it is not proven at any rate. It is not proven what it was worded in the indictment.

"They have also failed to prove that the policy directions of this company were under the immediate supervision and control of Mr. Brown. In fact, if Your Honor will recall the testimony by Mr. Dunstan, who was the manager of the loan department, that this transaction would have taken place even if Mr. Brown had been in Miami.

"They have just fallen short all the way through this indictment in proving any of these allegations against Mr. Brown. We feel this is just one case where there is no proof. If there was any proof, we feel that the jury would be entitled to rule on it, but there is just absolutely no proof, first, the main allegation that he fraudulently appropriated this money to his own use."

Thereupon Mr. Grady added:

"One thing he has overlooked there, all this is talking about a contract and they have never introduced a contract, and in addition this section he read here required the intrust and interest of said account within ten days after they have demanded it and said trust receipt and all of their proof shows six months and this outfit went bankrupt before that and upon demand, and they have never shown any proof a demand was made.

"They haven't proven anything that comes within this thing here or within the indictment, nothing. I can't find one thing they have proven."

Thereupon the Court said:

"Gentlemen, this is a question for the jury. Let your motion be overruled for a directed verdict, you may note an exception if you like.

"Mr. Grady: Note an exception." (R. 193, 195 and 200.)

Thereupon the defendant, **Scott N. Brown**, testified as follows:

That he lives at 332 Beck Avenue, Chattanooga, and that he is not engaged in any business at the present time; that he is a married man and has two sons, and that he is living on his wife's income. That previously he had been the head of various companies here in Chattanooga and that he was Chairman, President and Treasurer of First Trust Company and Real Estate Management; Chairman and Treasurer of Brown, Pless & Company; Chairman and President of Interstate Mortgage Company, and Chairman and President of Realty Title Company, and several others, and that each of said companies was set up to do some specific purpose; that he started in the real estate business on a full-time basis in 1933 and the first corporation was set up in 1939; that one side of his family had been in the real estate business here in Chattanooga for some 82 years and the other side since 1832; that he was raised and trained in the real estate business and was 29 years of age when he set up the first company and that over a period of years the principal business of his companies had been lending money to people wanting to purchase homes and that his companies had loaned at least $125 million to people in this area since he started in business and that his companies had made it possible for 7500 families to purchase homes in the Chattanooga area and had paid to banks here and elsewhere $2 million in interest, and that his companies had engaged principally in mortgage banking

and mainly financing homes; that he did some industrial and commercial financing but most of the business was confined to financing homes; that each company was set up for some specific purpose; that sometimes there was some overlapping; that he had about 55 employees and officers in his companies and probably 25 or 30 outside employees and that there was nothing secretive about the operation of the companies and that the situation with Chase and Pioneer was over a long period; that his companies commenced doing business with Chase about 1951 and one of the other banks in Chattanooga as a local depository and this was changed in 1952 to include the Pioneer.

Thereupon Mr. Brown testified as follows:

"Q. Mr. Brown, you are charged here with appropriating for your own use $13,400 relating to this Salter mortgage. Did you appropriate that to your own use?

A. No, sir.

Q. Were your companies set up in such a way that the operation would have been conducted whether you were present or not present?

A. Yes, sir.

Q. Has that happened on many occasions?

A. Yes, sir.

Q. You are also charged here with the policies and direction of this said company, it says under Scott N. Brown's immediate supervision and control. When the companies were set up did you set up the policies under which they were incorporated?

A. Yes, sir."

Mr. Brown further testified that in 1960, 1961 and 1962 they had directors or executive meetings, which totaled over forty and that the period was two and one-quarter years, and that the general business operation

of the companies was discussed at those meetings quite frequently.

Mr. Brown further testified that he had suffered from some ill health; that in 1958 he suffered a back injury that came to a head then, and finally had to have a spine operation; that he had some high blood pressure, some eye trouble and heart trouble, and had been away to get as much training in the profession in which he was engaged as possible and that he was careful to keep up with current trends of real estate, insurance and mortgage banking; that he had engaged in activities of the professional and trade affiliations, and filed as Exhibit "B" to his testimony a long list of activities showing his educational training and professional and trade affiliations, and this shows that he had obtained a bachelor of science in commerce degree from the University of Tennessee in 1930; that he attended the American Institute of Banking in 1931 and the Institute of Real Estate Management in 1946 at Birmingham, Alabama, and had participated in various courses sponsored by the Chattanooga Board of Realtors and had been president of the Chattanooga Board of Realtors and president of the Chattanooga Chamber of Commerce and many other organizations; that he had resigned from about half of these organizations, and in R. 209 Mr. Brown testified that he had never intentionally misappropriated or stolen any money from anybody and that his personal loss and that of his wife and his sons was a loss to him and they, of a minimum of $1 million, and perhaps $2 million, and that the only assets he had at the time of the trial was maybe $500.00 worth of clothing and jewelry; that for quite a while his personal books were in the hands of the auditors for the Trustee in Bankruptcy and that he had made repeated offers in the bankruptcy court and elsewhere to let the officers or any one else en-

titled to inspect his books look at them, and that he had his attorney Mr. Goins write the Attorney-General Mr. Davis, offering to submit all of his personal books and records to the Attorney-General, and a copy of the letter was filed as defendant's Exhibit "C," and to let any of the $13,000.00 be traced, if it was thought that he had any of it. That he operated his company in a normal, usual business manner and in the same way he did when he was 29 years of age; that he had many interruptions and his companies expanded so much and the volume of business was so tremendous that naturally he could not give every detail as much personal attention as he could have if he operated a one-man or two-man office.

Mr. Brown further testified that First Trust had six months on mortgage negotiations here like the Salter one, just as had been testified by Mr. Baird the day before, and that after this mortgage was a little less than sixty days later First Trust was forced into bankruptcy, and that he felt the bankruptcy could have been prevented, that it was not necessary to bankrupt the company, and that as soon as the bankruptcy took place, nearly any company he had observed the value of the companies immediately deflate to what they are worth under the hammer, more or less, as they are sold at auction or sold on a high loss basis; that the Salter mortgage is one of about 400 to 550 mortgages per year and that there were 70 to 80 mortgages involved in the bankruptcy and that amount would pay out in the ordinary routine of business, and that the reason the proceeds of the Salter mortgage were not paid at the end of the six months' period was that the bankruptcy intervened, and that the bankruptcy wiped out all the assets of the companies as going concerns and that all of the companies had been going concerns and had considerable value. That the other assets of real estate, etc., were rap-

idly dissipated, and gave as an example a note for $140,000.00 secured by a piece of real estate, and that this note was appraised at a minimum of $135,000.00 and was sold to a director of the Hamilton National Bank for $60,000.00, and that there were a number of automobiles sold at below market value, below cost, and that all of these things made it impossible for First Trust Company to make good on the Salter mortgage or any others at that period of time; that as an officer of these companies he handled considerable amounts of money and that perhaps in the calendar year of 1961 they handled twelve or fifteen million dollars, and that at the time of the bankruptcy First Trust Company had escrow accounts which belonged to the mortgagors, that were held in trust for taxes and insurance, and that the major loser was Chase Manhattan Bank, it being the largest creditor; that he had not had free access to the records but did not think any of the home owners had lost, but that of course the stockholders of the companies forced into bankruptcy lost money, amounting to the value of the stock they had, and that they lost quite a bit, and that he and his wife and sons had a loss in excess of a million dollars, and that had he wanted to steal he had the control of escrow accounts of five or six hundred thousand dollars; that he did not receive any money personally from the Salter mortgage and that the only money he received from First Trust Company during that time was two checks amounting to $25.79 for expenses, as the auditors had testified.

That he engaged in various activities away from his business, at the request of others to assist in the community and in Washington and other places, which were not especially designed to help the companies of which he was an officer but designed mostly to help the area and the real estate business in general throughout the country,

though some of it was helpful to his business—that his company benefited from what helped the community, through such organizations as the Committee of 100 for bringing new industry here, the Chamber of Commerce and organizations like that. That his wife's income consisted only of her salary and that she works at the Siskin Foundation, at a salary of $200.00 per month.

That these corporations had an attorney from time to time to advise them on legal matters; that they had an accounting department and outside auditors, and these functions could have gone right along the majority of the time without his presence; that his oldest son, Scott, Jr., is in the University of North Carolina and is on a partial scholarship and that next year he will have a job as dormitory adviser, which will assist him quite a bit in his expenses there, and that a scholarship was given to him because of his grades. Witness stated that he never knowingly appropriated any money from anybody during the time of all of the money he had handled since he was 29 years old; that he had no money at this time, having suffered a financial loss of between $1,000,000.00 and $2,000,000.00; that his wife did not have any money; that his children have a little money to finish their education, that was left to them by their grandmother, and that had not the First Trust Company been forced into bankruptcy this mortgage would have been paid off at the end of six months, as hundreds of such mortgages have been paid before.

On cross-examination Mr. Brown testified that affiliated companies with First Trust Company were Real Estate Management, Inc. and that he was Chairman, President and Treasurer of that company; Chairman, President and Treasurer of First Company; Chairman and Treasurer of Brown, Pless & Company; President and Treasurer of

Chattanooga Realty Company; President and Treasurer of Interstate Realty Company; Chairman and Treasurer of Interstate Mortgage Company; Chairman and Treasurer of Realty Title Company; President and Treasurer of Hotel Key, Inc. and President and Treasurer of Signal Properties, Inc.; that the owner of Signal Properties was a little company owned by his two boys and that he himself did not have any stock in it but acted as President and Treasurer, and that generally speaking, his duties were the same in each of the companies and involved those of chief executive officer of each of the companies and that he made the policy decisions to some extent and would see that the business was efficiently carried on; that he supervised to a limited extent the work of the heads of the other departments and of the clerical staff and other officers connected with the company, and that he, necessarily, as President, co-related his activities as they affected each other to some extent, and that as Treasurer of the companies he of course was in charge of supervising the work of the Accounting Department, more so than he would be in charge of the property management department. That as Treasurer he had authority to disburse the money according to policies set up by him as President, or in conjunction with the Board of Directors, as a part of his duties; that as a rule, generally speaking, he made the decisions affecting the money in the different companies; that he got approval on a great many matters that were beyond his own control or supervision and responsibility; that he would go to the executive committee or the board of directors, but that he did have specific authority to decide on the transfer of funds from one company to the other; that he did not recall whether he had blanket authority given by each of these companies as Treasurer but that it could have been. That he could transfer money

from First Trust Company to Chattanooga Realty Company or Real Estate Management—that he could decide it himself; that the Executive Vice-President could have done so or the Comptroller could have done so, and several other officers could have done so. That the Comptroller could have, upon his own initiative, transferred funds from, say First Trust Company to Real Estate Management without his approval, and that he thought that had been done, and that he had testified the operation would, and did, manage to go along without his presence, and that quite often he would telephone in and give directions to the Comptroller and that no one had authority to countermand his instructions, and that his instructions customarily would be followed and that at this time he did not know any particular reason why he would become treasurer of the company instead of someone else; that it was true that he had loaned at least $125,000,000.00, and that the money loaned was First Trust Company money exclusively, and he denied that his work was arranging loans with institutions for property owners; that they made most of their loans with their own money and borrowed money at the banks as operating capital, but the money was theirs when they made the loan; that copy of the journal shows that on December 29, 1961, the Salter mortgage was entered on the books as being receivable from Mr. Salter, and on January 2, 1962, check for $12,900.64 was issued to Phillips Real Estate Company and that the ledger sheet did not show the receipt of money from Chase Manhattan.

Witness further testified that he did not hire one firm of accountants or one lawyer for all of the firms; that they parceled out quite a bit of accounting and legal work, and to different firms for different companies, and that no one firm ever did it all, and that the reason the depository was

changed from Hamilton National Bank to Pioneer Bank was that it took Hamilton longer to get returns; that the Hamilton would deal with another bank in New York, and that bank would then deal with Chase Manhattan and the procedure was unsatisfactory and that he arranged a change; that the Hamilton National Bank had a procedure of requiring the obligation to them to be paid before they released the collateral and the unsatisfactory thing was that it took four or five days to get the credit, instead of about two days when they dealt with Pioneer, and that Pioneer advanced its own funds to their account and the Hamilton did not do that. That they would take a package of mortgage documents to the Hamilton National Bank, who would check them over and notify the National City Bank of New York, and the National City Bank would notify Chase, and Chase would confirm notification and credit the National City Bank, who would then credit Hamilton, and then Hamilton would credit First Trust Company, and that he supposed at this point the collateral would become pledged, though he did not know the technicalities or when the collateral was pledged. That for the last two or three years the Hamilton required payment before the collateral was released, and Pioneer had no such requirement, and that he thought he negotiated back in 1952 with Mr. Cotter of the Pioneer, and stated there was some bitterness at the Hamilton National because they had changed to Pioneer; that the business of First Trust amounted to quite a bit and at the time he resigned as president of First Trust they doing quite a bit of business with the Hamilton National Bank. That when he would be away he left instructions with the Comptroller or other officers of First Trust to limit the checks to $100.00 each unless there was some unusual emergency, and that in an emergency for a large amount of money the Comptroller or other officers would make disbursement.

Witness said that the valuation of his loss was his own and was based on the value of the securities as a going business and on the value that someone would pay for the securities on the basis of that business on a going basis; that is, a business in operation. That at the time of the bankruptcy of First Trust he did not think he owed First Trust anything; that he owed Real Estate Management $49,200.00 for money he had withdrawn from it and owed around $50,000.00 to Brown, Pless & Company; that he did not owe Chattanooga Realty Company anything but that it owed him a little over $20,000.00; that he did not owe Interstate Mortgage anything; that Brown-Pless Company's indebtedness was around $50,000.00; that it is in fact $52,550.00; that he owed Realty Title Company $13,079.20, and that the Chattanooga Realty Company owed him $21,599.66; that he owed Interstate Realty Company $232,061.20; that he owed all the companies about $313,000.00 and this was to buy stock or buy real estate, and that it represents money that was paid to him for certain purposes, including the purchase of stock or real estate and money that he had borrowed from the companies for the purpose of real estate and stock, et cetera, and that the total was $313,000.00; that First Trust Company was forced into bankruptcy; that he personally was not bankrupt but was insolvent, but had not been adjudged a bankrupt; that he was a director in First Trust Company but was not notified at the meeting where they decided to go into bankruptcy; that he read about the bankruptcy in the newspapers, and since then had read the minutes of the meeting, and that it was voluntary according to the accounts in the papers and according to the minutes of the meeting, and according to the bankruptcy filed in the District Court, and that the reason he used the term "forced into bankruptcy" was that one of the banks had pulled the rug out from under them; that their credit was with-

drawn by one of the banks, and others followed suit, and that it was a voluntary action—not on the part of the officers but of the directors. He further testified that he did not consider the encumbered real estate or the stocks as any asset at this time; that he did not have an office personally but stayed in an office in the James Building, and that he is not operating any type of business; that he has six or seven hundred thousand dollars of life insurance in force and that the premiums on these policies would be $25,000.00 to $30,000.00 per year, and so far as he knew the premiums are paid; that he does not own any of the insurance; that Pioneer Bank is paying the premiums on a large part of the insurance because it is security for them; that the various companies had paid dues and assessments in the organization to which he belonged; that he still belongs to the organizations except those he had marked as having resigned from; that he would say he has resigned from half of the organizations but still belongs to half, and that half would be approximately 37; that the American Hotel Association dues had been paid by the Hotel Key before he left there on March 15 and that he does not know what his status is there; that the American Industrial Development Council's dues are about $20.00 or $30.00, and he does not know when they are due and has not paid any dues personally since the bankruptcy, and that the seventy or eighty mortgages represented individual debts, but to tell he would have to have the records—that he didn't know; that he publicly took full responsibility for First Trust Company and affiliated companies and has since learned there were certain matters for which he was not responsible. That he in fact had very little to do with the Salter mortgage, but thinks that is his responsibility.

Witness was shown State's Exhibit No. 10—trust re-

ceipt for the Salter package and said he did not know who drew it; that the form was drawn probably ten years before the company went bankrupt and that he probably had something to do with it; that he did not think Mrs. Thomas meant that he took the form to the bank and brought the documents back—that he probably sent it to the bank by their regular bank messenger, who brought it back and probably gave it to her or might have put it on the witness's desk; but irrespective of who did authorize the sending, it was his responsibility.

Exhibit 13 was addressed to Chase Manhattan, which the Pioneer sent to Chase Manhattan, and witness assumed that the collateral documents were in the Pioneer Bank; that Exhibit 13 shows here Exhibit "B," request for an advance and he believed it had already been read into the record. He said that First Trust Company made the request and he signed it as President, and that he assumed the responsibility; that at some other date the bank messenger took this to the bank and got the documents and brought them back and either put them on his desk or gave them to Mrs. Thomas personally or someone else in her department, and that those documents were for the Commonwealth Life Insurance Company; that the trust receipt merely states, "We agree to pay you upon receipt of remittance from the investor or return the documents to you," and witness said they had six months in which to pay Chase; that the receipt does not say anything about being subject to anything, and witness then said, "We've got to put all these things together," and witness agreed with the Attorney-General that the trust receipt did not say "subject" to anything but that it did mean that other documents relating to the whole transaction have a meaning, too. Then the witness testified: "If the sole consideration was this one instrument, then we would be duty

bound to pay upon receipt from our investor"; and in answer to the Attorney-General's question as to why he did not see that the provisions about which he was speaking being included in the form, witness answered: "Well, as I said before, our procedures have been set up for many years and we tried to modify them and bring them up to date, from time to time, but we could not attend to everything—we had too much business—too much volume, and not enough time to do it—we could not take care of all the technicalities that should have been taken care of"; and in response to the Attorney-General's question, "no question in your mind that you used Chase Manhattan money, is there," the witness answered: "Well, we were using money that Pioneer had advanced of its own money, and in return, Chase reimbursed it for what it had advanced to us," and witness again said, "We were using Pioneer money." Then the witness testified that the reason he did not leave the security instrument at Pioneer instead of Chase Manhattan was because they did not have a line of that kind with Pioneer. The witness said that money (meaning Salter loan) came from the Pioneer Bank—it is all money; and then witness further stated: "We sent it over to the Pioneer Bank with the Pioneer Bank deposit slip shown on there, pay Pioneer Bank, First Trust Company Account 110. That was the endorsement stamp we used instead of filling out the deposit slip by typewriter—we used an endorsement stamp that Pioneer Bank had furnished us or that we had prepared for the Pioneer Bank account." Then the Attorney-General asked the witness who lost the money and witness answered: "Well, now, Chase claims to have lost money"; and thereupon the witness said, "We did not pay back the money when we got it from Commonwealth Life Insurance Company, we could not pay back the loan because the company was

forced into bankruptcy before the six months was up. There were certain events that took place in the period between March 27 and April 4, 1962, that finally culminated in bankruptcy about April 4, 1962."

Then the Attorney-General asked:

"Q. Don't you know that at the time you sold the collateral mortgage to Commonwealth Insurance Company you destroyed the collateral for the Chase bank?

A. No, sir, I don't believe I would have known that—I did not destroy any collateral.

Q. I don't mean you physically tore them up?

A. I think we could have, under the terms of our agreement, we could have thrown the mortgage in the waste basket as far as that goes.".

In response to the Attorney-General's further question, witness testified that six months was the maximum time that First Trust could keep this, under the agreement with Chase Manhattan; and then witness insisted that they had that much time to pay it, under any circumstances.

Thereupon the Attorney-General showed the witness what he said was Article 16, and the witness insisted that was only a part of the agreement.

Thereupon the witness testified that from an operating standpoint, he did not think First Trust ever had more liabilities than it had assets; that he thought it had more assets than liabilities, and then the witness was asked how he could lose a million or two dollars and he insisted that he had answered that question during the morning, and then the witness insisted that the bankruptcy depreciated the value of the securities of those companies and the affiliated companies, and testified that as a going business the $300,000.00 that he owed the companies was worth 100 cents on the dollar. That four other

companies, of which he was President and Treasurer, went into bankruptcy and all of them were put into bankruptcy by others than the witness; that he objected to the bankruptcy of the others, when he found out what they were going to do; that he made the objection to Mr. Royal Neece, Mr. Dick Jahn, Mr. John Fort and Hubert Pless and Mr. Strausberger, and a number of people, and not all of these mentioned were on the Board of Directors; that he did not appear before the Board of Directors and object; that he was not invited to any board meetings that he could recall; that he had resigned as Chairman, President and Treasurer of First Trust Company, but had not resigned as a director, and yet he was not notified of the directors' meetings and did not have a thing to do with the bankruptcy; that the bankruptcies of the other companies were not voluntary on his part; that he did not think he had anything to do with those bankruptcies; that he thought he objected to some of them but did not remember which ones: that he did not know what prevented First Trust from paying Chase Manhattan the money from Commonwealth; and witness insisted that the money could not be paid off at a later date because of the bankruptcy. Witness testified that he could have stolen four or five hundred thousand dollars of money in the escrow accounts; that there was no advance notice when some investor might come in and check the escrow money; that the FHA checked them without any notice, and witness thereupon insisted that he thought it was true that he could have taken the escrow money and he said it would have been uncovered when the auditors would have come in, and that perhaps it could have been the same day the auditors would come. Witness said he did not know whether Chase Manhattan's money had been paid and that according to the indictment it had not been paid back

when witness left First Trust; that personally he did not pay back the money, that he did not have the records and never did get the money himself, personally.

Witness testified that he had no fore-warning of any trouble with the banks until March 27, 1962, when he was called by Mr. Jack Whittaker to his office for a conference, and that they had a conference there with a number of their officers and two or three officers of the Pioneer Bank, and that was the first inkling that they were getting ready to shut off their credit. Witness testified that he and Mr. Whittaker of the Hamilton National Bank had had differences between them, and this was the bank that one of its directors bought a note against a 376 acre tract on Signal Mountain, that Interstate Realty had bought from First Trust Company for $187,000.00 in round figures, paying about $47,000.00 in cash; $140,000.00 in a ten or five year mortgage, and there was a big hurry after First Trust Company bankruptcy to get that into the hands of one of the bank directors, and he paid $60,000.00 for that $140,000.00 mortgage, that had been recently appraised by a member of the American Institute of Real Estate Appraisers at $135,000.00, and that is a typical example of what happened to the assets of these companies. Witness testified that he did not know how it happened that he was not notified of the directors' meeting, and that Mr. Russell, Vice-President of the Hamilton National Bank, presented letters of resignation of officers of various companies, and that he or someone from the Hamilton Bank notified First Trust Company directors that the witness had resigned as a director, as well as an officer, according to the minutes of the meeting, and it was not true that he had resigned as a director and that he and his family still own the controlling interest in First Trust; that the accountants put it 70 per cent constructive own-

ership in him and his family, and that it was disposed of without his being notified; that he had submitted a plan for handling the matter and continuing the company as a going concern but nobody saw fit to cooperate and First Trust Company was forced into bankruptcy. Witness said he had not drawn any salary in 1961; that he was more interested in seeing the company grow than in drawing a salary. Brown-Pless did not pay anything or Hotel Key or Real Estate Management, Inc. Witness said that his salary from all the companies amounted during the last 39 months to about $750.00 per month and then he said that he did not have a nickel of the money that was lost and that the books had been available and that he never received a penny, directly or indirectly from the Salter mortgage; and then witness testified further, that if $13,400.00 of the Salter money had been deposited in an account from which he had withdrawn money or from which he had transferred money into another account, this would not have benefited him; that it would benefit only First Trust Company. He said the money was deposited in First Trust Company; that he did not know how much was transferred and that the Attorney-General had heard the accountant testify as to that; that he recalled the auditor's testimony that there was a continual interchange of money between all of the companies and that it would be impossible to trace all the money (R. 201-274).

Thereupon the defense offered A. W. Goree, Dr. Herbert B. Banks, Dr. J. P. McCallie, Mrs. Kirk Wood, Mr. Sherman Paul, Mrs. Ruth Gay, Mrs. Audrey Gard, Floyd C. Delaney, Luther Massengale, Walter Greenspan, Chas. S. Henry, Arthur Patty, Jr., Dr. C. V. Brown, Jr., Eardell Finnell, Charles Flapp, H. W. Large and Ray Slagle as character witnesses, all of whom gave Mr. Brown a good

character and that he was worthy of belief on his oath in a court of justice (R. 274-291).

The foregoing was all of the evidence introduced on the trial of this cause.

In response to the defendant's motion for a directed verdict of "Not Guilty," the court inquired of the Assistant Attorney-General:

"What do you say about it?"

and Mr. Summar, the Assistant Attorney-General, stated:

> "May it please the Court, first I would like to look at the statutes that involve and define the fraudulent breach of trust which the prosecution has based on Tennessee Code Annotated 39-4226. The definition of fraudulent breach of trust and your Honor, for the record and part of that statute says under whose hands and under whose control, talking about appropriating personal property or money, it may be by his position as clerk, agent, factor or bailee, or any other contract or trust by which he was bound to deliver or return the thing received or its proceeds is a fraudulent breach of trust.
>
> "Under that statute, your Honor, if he was bound to return the proceeds of this loan advanced by Chase National Bank and it was appropriated, then it falls under this fraudulent breach of trust statute." (R. 196.)

Whereupon the court charged the jury as follows:

> "The indictment in this case charges the defendant, Scott N. Brown, with fraudulent breach of trust, on the 19th day of February, 1962, in Hamilton County, Tennessee. The indictment in this case is predicated upon the following sections of the Code of Tennessee:
>
> SECTION 39-4226. "The fraudulent appropriation of personal property or money by any one to whom it has been delivered on deposit, pledge, se-

questration, or to be carried or repaired, or in whose hands or under whose control it may be by his position as clerk, agent, factor or bailee, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, is a fraudulent breach of trust. So is the fraudulent appropriation of certain specific property by any one to whom it has been delivered on a contract of loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time, by a disposition not authorized by contract."

SECTION 39-4224. "A fraudulent appropriation of property by any person to whose charge or care it is delivered, subject to the immediate orders of the owner, or to the use of it in his presence, or for the purpose of his trade, is larceny."

SECTION 39.4228. "Every fraudulent breach of trust is declared to be a criminal offense, and punishment shall be the same as in the case of larceny."

SECTION 47-1020. Fraudulent breaches of trust. "The failure of a trustee under a trust receipt transaction as defined in Section 47-1003 to turn over to the entruster the goods which are the subject of said transaction, or to pay to the entruster the proceeds from the sale of said goods, or so much thereof as is needed to satisfy the entruster's interest in said goods within ten (10) days after the date performance is required in said trust receipt, which performance may be either on demand or upon the happening of some event as provided in the instrument creating the trust relationship, shall be a fraudulent breach of trust as defined and set out in Section 39-4226, and punishable as such. The failure of the trustee to turn over to the entruster the goods which are the subject of the transaction, or to pay the proceeds from the sale of same necessary to satisfy the entruster's interest, shall be prima facie evidence of fraudulent intent.

No intermingling of the proceeds from the sale of the property embraced in the trust receipt transaction with the funds of the trustee shall destroy the trust relationship in respect to such proceeds created by a trust receipt unless such intermingling was with the express written consent of the entruster. Failure of an entruster to protest against any conduct of the trustee which violates the trust receipt instrument shall not be deemed an acquiescence in such conduct and the establishment of a course of dealing and conduct between the parties other than the fiduciary relationship established by the trust receipt instrument.

In the event the trustee in a trust receipt transaction as above defined is a corporation or partnership, any officer or director, partner or agent of such a trustee who actively participates in the action which violates this section or who, with the knowledge of such violation by another officer, director, partner or agent, acquiesces therein, shall be guilty of a fraudulent breach of trust, and punishable as such.

SECTION 47-1003. What constitutes trust receipt transaction and trust receipt. "3. A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following: (a) In the case of goods, documents or instruments, for the purpose of selling or exchanging them, or of procuring their sale or exchange."

SECTION 47-1002. Definitions. " 'Instrument' means (a) any negotiable instrument as defined in the Uniform Negotiable Instruments Law and amendments thereto."

SECTION 47-101. "Requirements of negotiable instruments.—An instrument to be negotiable must conform to the foll wing requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawer, he must be named or otherwise indicated therein with reasonable certainty." (R. 292-295.)

JUDGMENT. May 17, 1963.

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

* * * * *

104179 State v. Scott N. Brown—Fraudulent Breach of Trust.

Again came the Attorney General and the defendant in person and the same sworn jury, to-wit: Mrs. Ethel Mae Brown, F. Ben Jackson, Mrs. Thomas L. Seitz, John P. Horne, James D. Thompson, R. D. Elam, Henry W. Nunn, Wilburn E. McBryar, Foy W. Watson, Jr., Clyde C. Dunn, Granville C. Thomas, Shelton W. Young and the extra juror Roy L. Tribble, in custody of the same sworn officers in whose charge they were placed on last evening, when respited, and the hearing of the case was resumed.

And after hearing all of the testimony, arguments of counsel and the charge of the Court, the extra juror Roy L. Tribble was excused by the Court and the regular jury panel retired to the jury room for deliberation. After considerable deliberation on their oaths say defendant is guilty as charged and fix his punishment at not more than 3 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not

less than 3 years nor more than three years and to pay the costs of the cause. Execution will issue against the defendant for the costs.

Defendant is allowed ten (10) days in which to file motion for a new trial. Bond fixed at $2,500.00. (R. 292-295.)

MOTION FOR A NEW TRIAL.

Filed May 23, 1963.

The defendant, Scott N. Brown, timely filed his motion for a new trial on May 23, 1963, and we copy here the grounds for a new trial applicable to this petition for certiorari:

2.

All of the evidence was consistent of the defendant's innocence and preponderated against his guilt, and there was no evidence upon which the jury could return a verdict of guilty.

5.

The Court erred in refusing to grant to the defendant a directed verdict of not guilty, at the conclusion of the State's proof, when it appeared that there was a great variance between the indictment and the proof presented by the State, and that the State had wholly failed to prove the material allegations of the indictment.

7.

The Court erred in refusing the jury the indictment in the case.

8.

The Court erred in not charging the jury in his charge the material allegations in the indictment, and further

erred by including in his charge statutes not charged or referred to in the indictment.

For these specific reasons, and all other exceptions made at the trial of this case, whether or not here specified, the defendant respectfully requests the Court to grant him a new trial in this cause. (R. 32, 33, 34.)

/s/ H. V. GRADY,
Attorney for Defendant.

MOTION FOR NEW TRIAL OVERRULED.

May 27, 1963.

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

104179 State v. Scott N. Brown—Fraudulent Breach of Trust.

This cause came on for hearing on motion for a new trial, heretofore filed, and the Court after hearing the motion and arguments of counsel, is of the opinion that said motion is not well taken and same is overruled, to which action of the Court in overruling said motion the defendant then and there excepted and prayed an appeal to the next term of the Supreme Court when sitting at Knoxville, Tennessee, which is granted, and the defendant is allowed 60 days in which to prepare, have signed and file his Bill of Exceptions. Bond is fixed at $2,500.00. (R. 34.)

There were a total of seven indictments against the defendant on the same date, on the same charge, the only difference being the names of the borrower, the date and amount of the loans and the date of sales, and were numbered and styled as follows:

104174 State v. Scott N. Brown—Fraud, Breach of Trust

104175 State v. Scott N. Brown—Fraud, Breach of Trust

104176 State v. Scott N. Brown—Fraud, Breach of Trust

104177 State v. Scott N. Brown—Fraud, Breach of Trust

104178 State v. Scott N. Brown—Fraud, Breach of Trust

104179 State v. Scott N. Brown—Fraud, Breach of Trust

104180 State v. Scott N. Brown—Fraud, Breach of Trust (R. 9).

TENDERING AND FILING BILL OF EXCEPTIONS.

The Defendant filed his motion for a new trial, within time allowed by the Court and said motion came on to be finally heard, which the Court was pleased to overrule, and the Defendant then and there excepted to the ruling of the Court and prayed for and was granted an appeal to the next term of the Supreme Court, sitting at Knoxville, Tennessee, and was allowed sixty days in which to prepare and file his Bill of Exceptions.

The Defendant files this his Bill of Exceptions to the judgment of the Court in overruling its motion for a new trial, which Bill of Exceptions is filed within the time allowed by the Court and which is signed and sealed and ordered to be made a part of the record in this cause.

This 24th day of July, 1963.

TILLMAN GRANT,
Criminal Judge.

(Filed July 24, 1963, Clyde M. Sanders, Clerk)

(R. 39-302.)

ASSIGNMENTS OF ERROR IN THE SUPREME COURT.

Plaintiff in Error, Scott N. Brown, timely filed his assignments of error in the Supreme Court on September 30, 1963, and we copy here said assignments of error that are applicable to this petition for certiorari:

I.

The State failed to prove any of the material allegations of the indictment, and all of the evidence was consistent with the defendant's innocence and preponderated against his guilt, and there was no evidence upon which the jury could return a verdict of guilty, and the Court erred in refusing to grant the defendant's motion for a directed verdict.

Indictment, pages 4 and 5, of Transcript, charges the following acts by the defendant, in brief, and that said acts constituted a breach of trust on his part:

That he did appropriate to his own use personal property, being $13,400.00 in money, which was the personal property of the Chase Manhattan Bank, a banking association, by certain means, to-wit:

On December 20, 1961, William T. Salter and wife negotiated with First Trust Company, a corporation, a mortgage in the amount of $14,000.00 on their property, and that the defendant was part of an executive head of First Trust Company, and the policy directions of this company were under his immediate supervision and control; and that, on January 29, 1962, the said First Trust Company, under the direction of the defendant, deposited with Pioneer Bank in Chattanooga, Tennessee, the mortgage documents securing the loan. Upon notice from this depository, Pioneer Bank, that the mortgage documents had been deposited, Chase Manhattan Bank advanced, on January 31 to First Trust Company, $13,400.00. On Feb-

ruary 12 the aforesaid documents were released to First Trust Company, and the trust receipt, and the said First Trust Company, acting through its present executive head, this defendant, sold the mortgage documents, on February 19, 1962, to Commonwealth Life Insurance Company, for $13,400.00, and deposited the proceeds to its own account. The proceeds from the sale to the Commonwealth Life Insurance Company were to be credited to the account of the Chase Manhattan Bank for that purpose and none other, and this the said Scott N. Brown well knew at the time he so received this money from Commonwealth Life Insurance Company. Scott Brown had received said money for the purpose aforesaid, and not regarding his duty in this behalf he, the said Scott Brown, did on the day and date aforesaid, fraudulently convert and appropriate the said money to his own use, etc. The defendant filed various motions to quash this indictment, and request to make it more specific.

See Pages 7, 10, 11, 12, 13 and 14, Page 28 of the Transcript.

And all of these motions were refused by the Court, and the defendant was ordered to trial on the indictment on Page 4 and 5 of the transcript, hereinbefore referred to.

The first State's witness placed on the stand was William Salter, who was to testify that he and his wife negotiated with First Trust Company a mortgage in the amount of $14,000.00 on their property. Instead, Mr. Salter stated that he did not negotiate with First Trust Company, but that Phillips Real Estate Agency in Cleveland, Tennessee, negotiated an F. H. A. mortgage, which was later financed through First Trust.

See page 7, beginning Line 24 through Line 17, page 8, of the Bill of Exceptions.

The next State's witness to testify was Mr. William

Baird, who was put on to testify as to the mechanics of the Salter transaction. Baird was to testify in relation to the indictment that Chase Manhattan Bank advanced on January 31, 1962, to First Trust Company $13,400.00, being the second element charged in the indictment, but instead Mr. Baird did not so testify, but testified that Pioneer Bank advanced money to First Trust Company, and that the defendant had nothing to do with the transaction, and that later on, Pioneer was reimbursed by the Chase Manhattan Bank; that the Chase Manhattan Bank made no advance to the First Trust Company.

See Page 21 of Bill of Exceptions, Line 17 through Line 16, page 24.

In addition Mr. Baird was to testify that there was a breach of contract between First Trust, wherein this defendant was President, as charged in the indictment, which was the basis for the breach of trust, in that the proceeds of the sale of this mortgage were to be credited to the account of Chase Manhattan Bank, and used for no other purposes.

See Indictment.

Instead Mr. Baird testified to just the opposite of this charge in the indictment.

See Page 27, Line 12 through Line 17, Page 31, wherein the State's witness testified that the contract provided for as long as six months for the return of this money to the Chase Manhattan Bank, and that this company had bankrupt sixty days after this particular transaction, making it impossible to comply with the terms of the contract.

The next witness for the State was Eloise Thomas, who testified only as to the mechanics of the mortgage transaction, and who contributed nothing to the charges in the indictment.

See Page 51, Line 19 through Line 1, Page 52.

The next witness for the State was Mr. Bernard J. Cassidy, representative of the Chase Manhattan Bank. Mr. Cassidy was to testify to the allegations of the indictment relating to the breach of contract which constituted a fraudulent breach of trust, but instead he testified that the loan agreement provided that the money could remain in First Trust for the period of six months, and that the company bankrupt some sixty days after this transaction, and, therefore, the contract was not breached.

See Page 77, line 21 through line 10, page 79.

The next witness for the State was Mr. Donald E. Wilding of the Commonwealth Life Insurance Company, who merely testified that his company bought the mortgage from First Trust Company.

See Page 106, Lines 1 to 22.

The next witness for the State was Mr. William Dunstan. Mr. Dunstan also testified as to the mechanics of the transaction, and knew nothing about the agreement between First Trust and the two banks.

See Page 120, Line 14.

And further testified, in contradiction to State allegations, that Scott Brown directed this transaction; that the actual sale of the mortgage could have been consummated even if Mr. Brown were not present.

See Line 14, Page 120, through Line 8, Page 121.

The next witness who testified for the State was Mr. Ralph Reece, who testified as a certified public accountant; and was put on for the purpose of showing the major allegations of the indictment, that Scott Brown, the defendant, did fraudulently convert and appropriate the money, and this mortgage, to his own use. Instead Mr. Reece testified that his record showed that Scott Brown did not receive any portion of this money personally.

See Line 9, Page 129, through Line 25, Page 130.

Mr. Reece further testified that they had books available to trace any money going to Mr. Brown, and he did not get this sum of money.

See Page 138, Line 15 through Line 16, Page 142.

Motion for directed verdict was properly made.

See Line 4, Page 155, through Line 25, Page 157, and was improperly denied by the Court. (R. 304-308.)

III.

* * * The only material allegation of the indictment, which would reflect on the guilt of the defendant, was whether or not he fraudulently converted to his own use this $13,400.00, which belonged to Chase Manhattan Bank. The defendant requested the Court to so charge the jury, and the Court refused to place the material allegations of the indictment before the jury for decision, which was error on the part of the Court.

See Page 261, lines 4 through 10.

The defendant's whole defense was based upon whether or not the indictment against him had been proven, and the Court did not give the jury the indictment in the case, and the Court erred in this action.

See Affidavits. (R. 309.)

AFFIDAVIT OF HENRY V. GRADY FILED WITH ASSIGNMENTS OF ERROR.

Filed Sept. 30, 1963.

Comes herein Henry V. Grady, being duly sworn according to law says:

That he was the attorney of Scott Brown, the defendant in this case; and that certain questions by the jury, who were in deliberation, caused him to inquire of the Court as to whether or not they (the jury) had

the indictment in the case. He was informed that they did not, and would not be given the said indictment of the Court.

Further affiant saith not.

HENRY V. GRADY

Subscribed and sworn to on this the 30th day of September, 1963.

KATHERINE C. GILLIAM,
Notary Public.

My Commission expires Dec. 5, 1965.

AFFIDAVIT OF R. D. ELAM FILED WITH ASSIGNMENTS OF ERROR.

Filed Sept. 30, 1963.

R. D. Elam being duly sworn according to law says: he was the foreman of the jury which convicted Scott N. Brown in his trial for fraudulent breach of trust. That the jury was prevented from considering the contract in the case because they did not see it and they had no way of knowing whether or not the allegations in the indictment were proven. They were not given the indictment and had only a vague memory of what it alleged. We convicted Brown on the section of the charge dealing with trust receipts. The charge was all we had to go by during the deliberation. Further affiant saith not.

R. D. ELAM.

Subscribed and sworn to on this the 30 day of September, 1963.

KATHERINE C. GILLIAM,
Notary Public.

My Commission expires Dec. 5, 1965. (R. 315.)

AFFIDAVIT OF TILLMAN GRANT.

Filed March 30, 1964.

STATE OF TENNESSEE,
COUNTY OF HAMILTON.

Now comes TILLMAN GRANT, who, being duly sworn, according to law, states as follows:

I am the Judge of the Second Division of the Criminal Court of Hamilton County, Tennessee, wherein the case against the defendant, Scott N. Brown, was tried. In this case, the jury was not given the indictment after the conclusion of the proof and did not have it available to them during their deliberations.

Further affiant sayeth not.

TILLMAN GRANT.

Subscribed and sworn to before me, this the 26 day of March, 1964.

LEON HALEY, JR.,
Deputy Criminal Court Clerk.

My Commission Expires: _____. (R. 359.)

IV.

The Court erred in including in his charge statutes not charged or referred to in the indictment.

See page 255, lines 3 through line 3, page 258

which are Code Sections specifically applying to the trust receipts, but not charged in the indictment, and are a different section of the Code, and not comprehended or named in the indictment as the Court directed the jury.

See page 258, lines 2 and 3. (R. 309.)

OPINION OF SUPREME COURT OF TENNESSEE.

We copy only so much of the opinion of the Supreme Court as relates to assignments of error applicable to this petition for writ of certiorari:

The plaintiff in error, hereinafter referred to as the defendant, was convicted of the offense of fraudulently appropriating to his own use thirteen thousand four hundred ($13,400.00) dollars in funds belonging to the Chase Manhattan Bank. The jury fixed his punishment at three (3) years in the penitentiary. A motion for a new trial was made and overruled. He appeals to this Court and assigns the following errors:

> "1. The State failed to prove any of the material allegations of the indictment, and all of the evidence was consistent with the Defendant's innocence and preponderated against his guilt, and the Court erred in refusing to grant the defendant's motion for a directed verdict.

The Supreme Court entirely overlooked Assignment of Error III and affidavits of Henry V. Grady and R. D. Elam, foreman of the Jury (58a, 59a).

> 4. The Court erred in including in his charge statutes not charged or referred to in the indictment.

In order that these assignments may be properly considered, it is necessary to review the transaction as reflected by the record which brought about the conviction of the defendant.

William T. Salter lived at Cleveland, Tennessee. During the year 1961 he made plans to purchase the property where he was living and went to the Phillips Real Estate Agency in Cleveland to negotiate a loan. This agency then contacted the First Trust Company of Chattanooga, of which the defendant was President and Treasurer. The Salter application for a loan was approved by

the First Trust Company, which had an arrangement with the Chase Manhattan Bank to advance funds to the First Trust Company through the Pioneer Bank of Chattanooga, when same was approved by Pioneer as to form. The actual note, deed of trust or mortgage, and other papers pertaining to the loans made were to be held by the Pioneer Bank for the use and benefit of the Chase Manhattan Bank.

The plan or agreement with the Chase Manhattan Bank was for temporary funds on mortgages owned by the First Trust Company and credit was to be extended for not more than six (6) months, after which time, the First Trust Company hoped to place the mortgage with some other company on a long-term basis and to use the funds so received from the long-term carrier to pay off the Chase Manhattan indebtedness. It was under this type of arrangement that the Salter transaction was handled.

The Salter application with the First Trust Company for a loan was approved and on January 29, 1962, the Pioneer Bank credited the account of the First Trust Company in the amount of thirteen thousand four hundred ($13,400.00) dollars, identifying the deposit slip as the "William T. Salter note." The record further reveals that the mechanics of handling the transaction was that the Chase Manhattan Bank in New York advance the $13,400.00 loaned on the Salter note by crediting the account of the Pioneer Bank, which, in turn, credited the First Trust Company account as aforesaid. Thus, the proceeds of the Salter note were traced from the Chase Manhattan Bank to the account of the First Trust Company in Chattanooga.

On February 12, 1962, the Pioneer Bank released in trust to the First Trust Company the Salter note, mortgage and all other papers connected with same and took the following receipt:

"First Trust Company has this day received from the Pioneer Bank in trust the following securities held by said bank referring to the loan of William T. Salter, deposited as collateral for our note held by you. We agree to pay you upon receipt of remittance from our investor, or return documents to you.

FIRST TRUST COMPANY
By: ELOISE C. THOMAS, *Asst. Secretary*"

On February 16, 1962, the Salter note was sold by the First Trust Company to the Commonwealth Life Insurance Company of Louisville, Kentucky. The funds received from the insurance company were not used to take up the trust receipt and pay off the indebtedness due the Chase Manhattan Bank.

The first assignment of error insists that the State failed to prove any of the material allegations of the indictment and that all of the evidence was consistent with the Defendant's innocence and preponderated against his guilt and that there was no evidence upon which the Jury could return a verdict of guilty and that the Court erred in refusing to grant the Defendant's motion for a directed verdict. A careful reading of the record discloses that there is very little dispute about the facts.

The proof clearly shows that the Chase Manhattan Bank made a temporary loan to the First Trust Company through the Pioneer Bank in the amount of $13,400.00, with the Salter note and mortgage as collateral and that the First Trust Company, through its officers, withdrew the Salter note under a trust receipt and resold it to the Commonwealth Life Insurance Company of Louisville, Kentucky. Now, the defendant insists that as the First Trust Company was a corporation, he is not responsible for this act: The record reveals throughout that the defendant personally directed the policies and the operation

of the Company and that he was President and Treasurer of same. The employee who signed the trust receipt and handled the transaction testified that this was done at the direction of the defendant. T. C. A. 47-1020, among other things, provides "* * * in the event the trustee in a trust receipt transaction, as above defined, is a corporation or a partnership, any officer of the corporation or partner or agent of such a trustee who actively participates in the action which violates this section or who, with knowledge of such violation by any other officer, director, partner or agent, acquiesces therein, shall be guilty of a fraudulent breach of trust and punishable as such."

This Court has repeatedly held that the Jury's verdict of guilt, approved by the Trial Judge, establishes the credibility of the witnesses supporting the verdict, displaces the presumption of innocence that attends the defendant on trial, raises a presumption of his guilt and puts on the defendant the burden of showing on appeal that the evidence preponderates against the verdict and in favor of innocence. *Cooper v. State*, 123 Tenn. 37, 138 S. W. 826; *Turner v. State*, 188 Tenn. 312, 219 S. W. 2d 188; *Batey v. State*, 191 Tenn. 592, 235 S. W. 2d 591; *Anderson v. State*, 207 Tenn. 486, 341 S. W. 2d 385. The first assignment is overruled. * * *

The Supreme Court entirely overlooked the latter part of Assignment of Error III and affidavits of Henry V. Grady and R. D. Elam, foreman of the jury (58a, 59a).

The defendant next assigns as error the fact that the Judge included in his charge statutes not charged or referred to in the indictment. In other words, the Defendant insists that he was indicted under one statute and convicted under another.

TCA 39-4226 deals with the fraudulent appropriation of personal property or money by anyone to whom it has

been delivered on deposit. In reading Section 47-1020, and other sections complained of by the Defendant, we find nothing in conflict or prejudicial to the Defendant's right. These statutes more definitely define what is fraudulent breach of trust and we think that it was proper for the Court to read same in his charge to the Jury. TCA 40-1802 provides: "The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the Court, on conviction, to pronounce the proper judgment; and in no case are such words as "force and arms" or "contrary to the form of the statute" necessary."

We believe the indictment satisfies legal requirements and that it was not error for the Court to read all of the law relative to the charge to the Jury. The fourth assignment of error is overruled.

The Defendant insists in his fifth assignment of error that he should have been permitted to introduce the contract between the Defendant's company and the banks upon which the charge was based. This contract dealt with the procedure for handling loans. Three State's witnesses testified to the material content of the contract and there is little controversy about same. We do not find in the record that Defendant offered the contract in evidence. The reference complained of by the Defendant cites us to the following incident which occurred after the Jury had been out about two hours:

> Foreman—"On page 2 it reads, 'Upon the happening of some event as provided in the instrument creating the trust relationship,' what does that instrument refer to?"
>
> The Court—"Well, I might state this. That the

Court would like to further enlighten you, but under the rules of the Court, cannot give you any further oral instructions. It is mandatory that the Court give you a written charge and that is what the Court has done. The Court cannot give you any further instructions."

Foreman—"One other question. One item introduces the item 16, withdrawn, that had the 60-day clause in it. Shall we consider that or reject it?"

The Court—"Well, it's up to the jury to decide the case."

Foreman—"Thanks."

We do not think this can be assigned as error as Defendant had not offered the contract in evidence during the trial.

The Defendant, in his last assignment of error, insists that the Court erred in refusing the introduction of certain pleadings in a civil case dealing with this transaction. We do not believe that the pleadings in the civil suit would have been competent and we don't see how it could have helped the Defendant. Certainly, the Chase Manhattan Bank had a monetary interest in this matter. They so testified through their officers. We do not believe that the Trial Judge abused his discretion in refusing this evidence. This assignment is overruled.

The Defendant has had a long and successful business career. There were many outstanding business men, ministers and civic leaders who testified as to the Defendant's good reputation. It is not pleasant for us to affirm this conviction; but the proof is clear that the Defendant sold the Salter note twice and violated the laws of the State of Tennessee.

It, therefore, follows that all assignments of error are overruled and the judgment of the Lower Court is affirmed. PER CURIAM. (R. 330-339.)

JUDGMENT OF SUPREME COURT, FILED AND ENTERED WEDNESDAY, JANUARY 8th, 1964.

BE IT REMEMBERED, That at a September Term of the Supreme Court for the Eastern Division of Tennessee, held at Knoxville on the Second Monday of September, 1964, the following proceedings were had and entered of record, to-wit:

SCOTT N. BROWN

vs.

THE STATE.

No. 28 Hamilton County Criminal Offense: Fraudulent Appropriation Affirmed.

Came the plaintiff in error, Scott N. Brown in proper person and by counsel, and also came the Attorney-General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Hamilton County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiff in error, for his offense of Fraudulent Appropriation, be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Three (3) years, and not less than Three (3) years, commencing on the day taken into custody by the Sheriff of Hamilton County, being January 7, 1964.

It is further ordered by the Court that plaintiff in error be disqualified from holding any office under this State. The plaintiff in error will pay the costs of the cause

accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Hamilton County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Hamilton County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

HAMILTON S. BURNETT

(R. 340.)

PETITION TO REHEAR, FILED JANUARY 22, 1964.

Portions applicable to this Petition for Certiorari are copied here:

2. The defendant would further show the court that he made numerous motions which are part of the record in this cause to require the State to be specific in the indictment upon which he was to be tried. That the State refused to charge him with anything under the Breach of Trust Statutes, and the court did not so require the State, except the indictment, which charged in essence that he had appropriated certain monies to his own use, which were the property of the Chase Manhattan Bank. There was no testimony introduced in this record by either the State or the defendant that Scott N. Brown appropriated to his own use any money belonging to anyone and in fact the State's witnesses all testified that from the records available he did not appropriate any money to his own use. The court refused the defendant's motions

for a directed verdict and added to his charge statutes dealing with specific acts relating to a Trust Contract. The legal situation which the defendant then faced was that the jury could acquit him of every charge in the indictment and still convict him under the statutes in the court's charge. These statutes dealt with the contract and it appears that these statutes are what the jury convicted this defendant upon. The court, in their opinion, has quoted the remarks made by the jury requesting information upon the contract and its terms that this company bankrupted before a Breach of Contract could occur, which would make this defendant guilty under the Breach of Trust statutes charge by the court. The court has taken the position that the jury could return a verdict of "Guilty" for a Breach of Contract and yet never see the contract; but that the defendant cannot complain about such extremely prejudicial error because while he insisted that the State introduce the contract, he did not offer it himself in evidence. Your petitioner would respectfully show the court that he has no burden to offer anything in evidence to show his innocence, but that all of the burden of proof is on the State to show him guilty beyond any reasonable doubt and to hold otherwise would be to place the defendant in the position of proving his innocence.

3. Petitioner would respectfully show to the Honorable Court that the Court overlooked or ignored the last part of the defendant's third assignment of error, which points out that the defendant's whole defense was on the indictment against him and the only question before the jury was whether or not the State had proven his guilt to the charges in the indictment beyond a reasonable doubt. The jury was prevented from determining this question by the fact that they were not given the indictment. This fact is not controverted and the record contains the affi-

davit of the jury foreman stating that the jury had no way of knowing whether or not the allegations in the indictment were proven or not and that they were not given the indictment, and had only a vague memory of what it alleged.

While it is true that the indictment was read to the jury at the beginning of the trial the indictment is a complicated instrument in this case, and to hold that this was a sufficient presentment of the indictment to the jury would be to hold that they had sufficient ability to memorize and retain the context of the indictment sufficiently for the duration of the trial, to reproduce and deliberate upon it, and determine from it whether the State had proven the allegations in said indictment beyond a reasonable doubt.

4. The petitioner would further show the court that in addition to denying the indictment to the jury that the defendant requested the court to charge the jury as to the crux of the offense charged in the indictment. "That if the State has failed to prove to you beyond a reasonable doubt that the defendant did unlawfully, feloniously and fraudulently convert and appropriate to his own use Thirteen Thousand Four Hundred Dollars ($13,400.00), the personal property of the Chase Manhattan Bank, your verdict will be 'not guilty'." The court refused to allow the jury to determine whether or not he was guilty or innocent of this charge.

5. The petitioner would further show the court that the refusal to give to a jury trying him on an indictment, the indictment or a copy of it, so that his guilt or lack of guilt might be determined, was such a gross violation of his Constitutional Rights under the Constitution of the United States that specifically it has abridged his privileges or immunities under the Fourteenth Amendment of

the Constitution of the United States and has deprived him of his liberty without due process of law and has denied to him equal protection under the law, in violation of his Constitutional Rights.

Wherefore, your petitioner respectfully prays to the court that they grant this, his petition to rehear and reverse on this new argument and additional grounds not previously considered the affirmation of the lower court's verdict, and grant your petitioner a new and proper trial.

Respectfully submitted:

SCOTT BROWN,

Petitioner,

H. V. GRADY,

Attorney for Petitioner.

(R. 342-344.)

OPINION OF COURT ON PETITION TO REHEAR, FILED MARCH 5, 1964.

The Defendant has filed a petition to rehear in this cause, wherein it is insisted that the indictment was returned upon hearsay testimony and that the State was not required to be more specific in its charges. Other matters complained of are whether the State had proven the Defendant's guilt beyond a reasonable doubt, and that the jury was not given a copy of the indictment.

As pointed out in our original opinion, the jury's verdict of guilt approved by the Trial Judge establishes the credibility of the witnesses supporting the verdict, displaces the presumption of innocence that attends the Defendant on trial, raising presumption of his guilt and puts on the Defendant the burden of showing on appeal that the evidence preponderates against the verdict in favor of

innocence. See *Cooper v. State*, *supra*, and other authorities.

We have carefully examined the petition to rehear and we feel that all of the questions raised were considered in our original opinion. With reference to the insistence that the Court's charge was broader than the indictment, we believe it was the duty of the Court to charge all of the law on the issues raised.

Petitioner insists that the Court refused to let the jury see a copy of the indictment. We find nothing in the record to indicate that the Trial Judge refused to let the jury have the indictment, or that the jury did not have the indictment, nor was this assigned as error on appeal; and we must assume that the Trial Judge followed the law.

It, therefore, follows that the petition to rehear must be denied. PER CURIAM. (R. 349-350.)

JUDGMENT OF SUPREME COURT ON PETITION TO REHEAR, FILED MARCH 5, 1964.

This cause came on to be further heard on the Petition to Rehear and Reply thereto, upon consideration whereof the Court is of opinion the Petition to Rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the Petition to Rehear is denied.

Costs on petition to rehear will be paid by Scott N. Brown, for which let execution issue.

HAMILTON S. BURNETT,
S. L. FELTS,
WELDON B. WHITE.

(R. 351.)

ORDER OF SUPREME COURT PERMITTING PLAINTIFF IN ERROR TO FILE SECOND PETITION TO REHEAR, FILED MARCH 17, 1964.

In this cause, on motion of plaintiff in error, Scott N. Brown, by his attorney, it is ORDERED and ADJUDGED by the court that plaintiff in error be, and he hereby is permitted to file in this court a second petition to rehear, and he and his attorney are granted until Monday, March 23d, in which to file said petition to rehear.

ENTER, this 16 day of March, 1964.

HAMILTON S. BURNETT,
Chief Justice, Supreme Court.

O.K.:

JOHN S. WRINKLE,
Attorney for Plaintiff in Error,
Scott N. Brown. (R. 352.)

SECOND PETITION TO REHEAR, FILED MARCH 23, 1964.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Tennessee Sitting at Knoxville:

Your petitioner, Scott N. Brown, is greatly aggrieved at the memorandum opinion and judgment of the court, filed and entered in this cause on January 8, 1964, overruling his six Assignments of Error, and particularly Assignment of Errors I and IV, and at the judgment of the court entered March 5, 1964, overruling petitioner's first petition to rehear, and denying him a new trial.

A timely order has been entered, giving petitioner permission to file this, his second petition to rehear.

We believe this Honorable Court, as well as the Attorney-General representing the State of Tennessee, and counsel for petitioner have completely overlooked that the William T. Salter and wife, Margaret Jean Salter note was never actually pledged to either the Pioneer Bank or Chase Manhattan Bank. No proof whatsoever in this regard was offered and the testimony of Mr. Winfield Baird was merely to the effect that the papers "were in order" (Tr. 13, middle of page); yet the State filed, as its Exhibit No. 3 the Salter note, which shows clearly on its back that it was never endorsed by First Trust Company, to whom the note was made payable, to either the Pioneer Bank or Chase Manhattan Bank. The only mark on this note is as follows:

> "Without recourse on the undersigned, pay to the order of Commonwealth Life Insurance Company, this 13 day of February, 1962.
>
> FIRST TRUST COMPANY,
>
> By: SCOTT N. BROWN, *President*"

In 49 *Corpus Juris*, under the subject of "Pledges," at Section 5, page 897, the law is stated thus:

> "Primary purpose of a pledge is to put it in the power of the pledgee to reimburse himself for the money advanced, when it becomes due and remains due and unpaid, and the contract carries with it an obligation that the security shall be made effectual to discharge the obligation."

This Salter note shows on its face that it is payable to the order of First Trust Company. Could either the Pioneer Bank or Chase Manhattan Bank have made any collection of money on this note?

The indictment charges that the defendant, Scott N. Brown, unlawfully, feloniously and fraudulently appropriated to his own use $13,400.00.

We believe this Honorable Court has overlooked also State's Exhibit No. 10 to the testimony of Winfield Baird (Tr. 18), which was a receipt signed by Mrs. Eloise C. Thomas for "all documents." These documents were an unendorsed Salter note for $14,000.00; deed of trust on property in Bradley County to secure payment of the Salter note, and other letters, none of which were of any value toward paying the $13,400.00 debt that had been made on January 29, 1962, when the Pioneer Bank deposited to the credit of First Trust Company $13,400.00 (State's Exhibit No. 8).

We believe this Honorable Court has also overlooked State's Exhibit No. 14 to the testimony of Bernard J. Cassidy, which shows that the Chase Manhattan Bank, on January 31, 1962, deposited to the credit of the Pioneer Bank for having loaned First Trust Company $13,400.00 on January 29, 1962.

The court will thus see that the original $13,400.00 on January 29, 1962, was in fact a loan and that the advancement two days later by Chase Manhattan Bank in effect repaid the Pioneer Bank for having made the loan to First Trust Company. Mrs. Thomas merely receipted for the unendorsed Salter note and other papers.

The defendant, Scott N. Brown, stands indicted for having appropriated to his own use $13,400.00. He stands convicted of this offense by the jury; yet from the proof his only offense is having failed to repay a debt of $13,400.00 to either the Pioneer Bank or the Chase Manhattan Bank. His only offense is failing to return the Salter papers, which perhaps were not worth $5.00 to anyone.

Therefore, Mr. Brown is greatly aggrieved at this Honorable Court's failure to sustain his first assignment of error, that the State had failed to prove any of the material allegations of the indictment, that all of the evi-

dence was consistent with the defendant's innocence and preponderated against his guilt, and that there was no evidence on which the jury could return a verdict of "guilty," and that the Trial Court and this court had erred in failing to grant defendant's motion for a directed verdict, and this Honorable Court should now reconsider and find from this record that there was no evidence to sustain a verdict of guilt, and reverse the trial court and grant the defendant, petitioner here, a new trial.

We believe this Honorable Court has entirely overlooked the fact that Section 47-1020, Tennessee Code Annotated, has no relation whatsoever to the charge in the indictment; yet the Trial Judge, at pages 55, 56, charged this Code Section in full to the jury, and, unquestionably, it was on the last paragraph of this section that the jury found the defendant guilty of having appropriated the $13,400.00 to his own use. We think this section relates only to goods or articles such as automobiles, materials in process of manufacture, etc. The purpose of the Legislature in enacting this section was to aid in floor plans for automobiles or other merchandise, or for articles in the process of manufacture.

Section 39-4226, Tennessee Code Annotated, has fully answered the needs of this State relating to notes, money, bonds, etc., for more than 100 years and, as we understand, has not been amended and this section of the Code today is the same as the Code of 1858.

We most respectfully insist that neither the Pioneer Bank nor the Chase Manhattan Bank ever had any interest in the Salter note; that it was never pledged to either of them, and that the defendant, Scott N. Brown, merely owes them a debt, and that the Trial Court and the jury have convicted the defendant, imprisoning him for a debt, in violation of Section 18, Article 1, of the Constitution of

Tennessee, and that this was done especially because of the error of the Trial Judge in charging the jury, Section 47-1020, Tennessee Code Annotated, and especially that he would be guilty under this section if he failed to pay the debt within ten days, and that the Trustee receiving the papers was a corporation and any officer or director of such Trustee, in violating this section, or who with knowledge of such violation by another director who acquiesced therein, would be guilty of fraudulent breach of trust and punishable as such. We believe this Honorable Court has overlooked the seriousness and injustice of this charge.

We believe this Honorable Court has entirely overlooked the fact that the Grand Jury and the indictment never contemplated Section 47-1020, Tennessee Code Annotated, and the indictment was returned only under Section 39-4226, Tennessee Code Annotated, and there is no proof whatsoever in the record to support a conviction under said Section 39-4226.

We believe this honorable Court has overlooked the fact that the Trial Judge's overruling defendant's motion for a new trial and allowing the conviction to stand, without any proof, and in failing to give to the jury the indictment to consider in the jury room, as to the guilt or innocence of the defendant, was a violation of his Constitutional rights under the Constitution of the United States and, specifically, its abridging and denying his privileges or immunities under the Fourteenth Amendment to the Constitution of the United States, and has deprived him of his liberty, without due process of law and denied to him the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, and that it is the duty of this Honorable Court to enforce his rights under said amendment to the same extent that it

is the duty of the Federal courts to enforce the Fourteenth Amendment to the Constitution of the United States.

We attach hereto and make a part of this petition the affidavit of Henry V. Grady, to the effect that the jury did not receive the indictment in its deliberations in the jury room, and we ask leave of this Honorable Court to be permitted to file a similar affidavit of the Trial Judge, that the indictment was not delivered to the jury for its deliberations in the jury room.

WHEREFORE, the petitioner, Scott N. Brown, most respectfully petitions and prays this Honorable Court to reconsider its opinion and judgment overruling his assignments of error and his first petition to rehear and to now grant him a rehearing and sustain his said assignments of error, particularly Assignments I and IV, and to allow that part of the record showing that the indictment was not given to the jury in its deliberations to be considered, and now grant unto him a new trial.

Respectfully submitted:

HENRY V. GRADY,
JOHN S. WRINKLE,
Attorneys for Scott N. Brown.

(R. 353-357.)

OPINION OF SUPREME COURT ON SECOND PETITION TO REHEAR, FILED APRIL 8, 1964.

Permission having been granted, a second petition to rehear has been filed herein. This petition was filed by new and additional counsel obtained by the petitioner since the first petition to rehear was overruled.

This second petition in essence is merely a reargument of what was argued at the Bar of this Court and in the original brief and in the first petition to rehear. It is

true that the argument herein is phrased differently and in different words by new counsel, but to all intents and purposes it is the same argument.

One of the arguments made in this petition is to the effect that the trial court erred in reading Section 47-1020, T. C. A. to the jury. This question was acted on in the original opinion on page 8 thereof. This Section makes the failure of a Trustee under a trust receipt transaction to turn over to the entruster the goods, etc., or to pay the entruster the proceeds from the sale of said goods, a fraudulent breach of trust. We held that the reading of this Code Section to the jury did not affect the matter in the least, even though the Section was not applicable to the charges made out in the indictment. Since this is merely a reargument of a question heretofore considered, which we still think was not erroneous, this contention is overruled.

The indictment was primarily based on Section 39-4226, T. C. A., and, under the facts sufficiently set forth in the original opinion, clearly this petitioner was guilty of the violations of said Code Section. It is seriously argued in this second petition to rehear that the only offense that Brown has committed was the failure to repay a debt to either the Pioneer Bank or the Chase Manhattan Bank, and it is said that this note which was turned over to him, which he hypothecated as shown in the original opinion, was not properly endorsed, and therefore neither bank could collect on it. This question is immaterial, since it is shown in the original opinion, and is copied there, that the trust receipt he executed he violated by transferring this note to a third party and thus reaped benefits thereof. This clearly makes him guilty of violating Code Section 39-4226, upon which the indictment is based. This contention must again be overruled.

It is again argued in this second petition to rehear that the conviction below must be reversed because the jury did not have the indictment during its deliberations of the case in the jury room. This question was specifically answered in the opinion on the first petition to rehear. The record does not show in any particular that such was not done, and as said in the opinion on the first petition to rehear, we must presume that these formalities were complied with. Affidavits are now filed that this was not done, and it is insisted on the basis of these affidavits that this conviction should be reversed. In the first place, affidavits are not a part of the record in any case, and cannot be considered by us on review. *Sherman v. State*, 125 Tenn., 19, 140 S. W., 209. These affidavits were all taken since the record was made and brought up to this Court. Regardless of this fact we think that it is certainly proper that we imply that the failure of sending the indictment to the jury room with the jury is waived, when it is not shown by the record that such was demanded. We must presume that a copy of the indictment was taken by them when the record does not affirmatively show that it was not done. The question here raised is very much like the Constitutional right of Article I, Section 9, of the Tennessee Constitution of the defendant to have and see a copy of the indictment. This Court for nearly a hundred years has held that the waiver of the right will be implied if the copy of the indictment has not been demanded by the defendant. *Moses v. State*, 68 Tenn., 229. Likewise, where it is not shown that a copy of the indictment was furnished to him it will be presumed that it was furnished and that the failure of the record to show to the contrary will be presumed to be waived. *Davis v. State*, 65 Tenn., 429; *Taylor v. State*, 79 Tenn., 708; and the more recent case of *Cogdell v. State*, 193 Tenn., 261, 246 S. W. 2d, 5.

After carefully considering the second petition to rehear and again reviewing the record and our former opinion, we are satisfied that no prejudicial error has been committed herein and this petition must and is accordingly overruled. PER CURIAM. (R. 363-366.)

JUDGMENT OF SUPREME COURT, ORDERING AND DECREEING THAT SECOND PETITION TO REHEAR BE DENIED—FILED APRIL 30, 1964.

This cause came on to be further heard on the Second Petition to Rehear and Reply thereto, upon consideration whereof the Court is of the opinion the Petition to rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on petition to rehear will be paid by Scott N. Brown, for which let execution issue.

HAMILTON S. BURNETT
S. L. FELTS
ROSS W. DYER

(R. 367.)

ORDER OF SUPREME COURT STAYING ITS JUDGMENT UNTIL THE SUPREME COURT OF THE UNITED STATES ACTS ON PETITION FOR WRIT OF CERTIORARI AND ORDERING THAT THE ORIGINAL EXHIBITS GO TO THE UNITED STATES SUPREME COURT, ENTERED APRIL 30, 1964.

In this cause, on motion of plaintiff in error, Scott N. Brown, it is ORDERED, ADJUDGED AND DECREED by this Court that the final judgment of this Court be, and it hereby is, ordered stayed until final action by the Supreme

Court of the United States, on a petition for writ of certiorari to be filed in the Supreme Court of the United States by Scott N. Brown, to review the opinions and judgments of this Court in this cause; and that the bond now in effect for plaintiff in error, Scott N. Brown, shall remain in force until final action by the Supreme Court on said petition for writ of certiorari.

It is further ordered by this Court that the originals of the exhibits on file in the transcript in this Court be withdrawn and made a part of the certified copy of the record in this Court, to be filed with said petition for writ of certiorari, and that photostat copies be substituted by the clerk for the original exhibits on file in this Court.

ENTER, this 30 day of April, 1964.

HAMILTON S. BURNETT,

Chief Justice Supreme Court.

(R. 368.)

JOHN S. WRINKLE,

1521 Hamilton National Bank Building,
Chattanooga, Tennessee,

Attorney for Petitioner, Scott N. Brown.

No. 249

Office-Supreme Court, U.S.
FILED
JUL 24 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

SCOTT N. BROWN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

INDEX.

Page

Questions presented 2

Statement of the case pertinent to the questions raised in the petition 2

Brief and argument 6

Cases Cited.

Hurtado v. California, 110 U. S. 516, 535 10

Leeper et al. v. State of Texas, 139 U. S. 462, 35 L. Ed. 225 10

McCrone v. United States, 307 U. S. 61, 65, 59 S. Ct. 685, 687 9

Russell v. United States, 369 U. S. 749, 765-766, 82 S. Ct. 1038, 1047-1048 6

Sherman v. State, 125 Tenn. 19, 140 S. W. 209 8

Statutes Cited.

Section 27-111, Tennessee Code Annotated 8

Section 39-4226, Tennessee Code Annotated 2, 3, 6

Section 40-1802, Tennessee Code Annotated 5

Section 47-1020, Tennessee Code Annotated 2, 3, 4, 6

Rules Cited.

Rule 73 (g), Rules of Civil Procedure 9

Rule 39 (b), Rules of Criminal Procedure 9

IN THE

SUPREME COURT OF THE UNITED STATES.

SCOTT N. BROWN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner prays that a writ of certiorari issue by this Honorable Court to review an opinion of the Tennessee Supreme Court in the case of Scott N. Brown v. State of Tennessee. Petitioner was convicted of fraudulent breach of trust and sentenced to serve three years in the State Penitentiary. The original opinion was dated January 8, 1964; the first petition to rehear was denied in an opinion dated March 5, 1964; and an opinion on a second petition to rehear was handed down by the Tennessee Supreme Court April 7, 1964. Publication was not made of the opinion nor was either of the opinions denying petitions to rehear published. A portion of the original opinion has been included in the Appendix to the petition for writ of certiorari at Pages 61A-66A and the two opinions

of the Tennessee Supreme Court relative to the petitions to rehear are copied in full, Pages 67A-68A, Appendix to Petition for Writ of Certiorari and Pages 78A-81A, Appendix to Petition for Writ of Certiorari. The entire record, of course, has been filed with the Clerk of this Honorable Court.

QUESTIONS PRESENTED.

Counsel for the petitioner insists that this Honorable Court should determine whether or not the petitioner was deprived of due process of law as guaranteed him by the Fourteenth Amendment, Constitution of the United States in the criminal proceeding culminating in his conviction of fraudulent breach of trust because (1) there is no evidence in the record of the criminal proceeding supporting a conviction of fraudulent breach of trust as charged in the indictment; (2) the petitioner was indicted under Section 39-4226, Tennessee Code Annotated, for a fraudulent breach of trust but tried and convicted under Section 47-1020, Tennessee Code Annotated; and (3) the jury was not permitted to have a copy of the indictment before them during their deliberation of the case.

STATEMENT OF THE CASE PERTINENT TO THE QUESTIONS RAISED IN THE PETITION.

The indictment in substance alleges that the petitioner unlawfully, feloniously, and fraudulently appropriated $13,400.00 to his own use, the property of the Chase Manhattan Bank, by depositing the same to his own account when he, by virtue of the terms of the trust receipt, was bound to deposit the same with the Pioneer Bank of Chattanooga, Tennessee, to the credit of the Chase Manhattan Bank. The indictment does not allege which section of the Criminal Code of Tennessee was contravened by petitioner's unlawful appropriation of the funds.

The proof supported the allegations in the indictment in every detail. The Tennessee Supreme Court in its summary of the evidence found this to be true.

The Trial Judge in his instruction to the jury read both Section 39-4226, Tennessee Code Annotated and Section 47-1020, Tennessee Code Annotated, to the jury. (Other sections of Tennessee Code Annotated were read to the jury by the Trial Judge but apparently no complaint was made regarding them.) These sections are as follows:

> "'Fraudulent breach of trust' defined.—The fraudulent appropriation of personal property or money by any one to whom it has been delivered on deposit, pledge, sequestration, or to be carried or repaired, or in whose hands or under whose control it may be by his position as clerk, agent, factor, or bailee, or on any other contract or trust by which he was bound to deliver or return the thing received of its proceeds, is a fraudulent breach of trust. So is the fraudulent appropriation of certain specific property by any one to whom it has been delivered on a contract of loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time, by a disposition not authorized by the contract."

Section 39-4226, T. C. A.

> "Fraudulent breaches of trust—Evidence of fraudulent intent—Effect of intermingling proceeds.—The failure of a trustee under a trust receipt transaction as defined in 47-1003 to turn over to the entruster the goods which are the subject of said transaction, or to pay to the entruster the proceeds from the sale of said goods, or so much thereof as is needed to satisfy the entruster's interest in said goods within ten (10) days after the date performance is required in said

trust receipt, which performance may be either on demand or upon the happening of some event as provided in the instrument creating the trust relationship, shall be a fraudulent breach of trust as defined and set out in § 39-4226, and punishable as such. The failure of the trustee to turn over to the entruster the goods which are the subject of the transaction, or to pay the proceeds from the sale of same necessary to satisfy the entruster's interest, shall be prima facie evidence of fraudulent intent.

"No intermingling of the proceeds from the sale of the property embraced in the trust receipt transaction with the funds of the trustee shall destroy the trust relationship in respect to such proceeds created by a trust receipt unless such intermingling was with the express written consent of the entruster. Failure of an entruster to protest against any conduct of the trustee which violates the trust receipt instrument shall not be deemed an acquiescence in such conduct and the establishment of a course of dealing and conduct between the parties other than the fiduciary relationship established by the trust receipt instrument.

"In the event the trustee in a trust receipt transaction as above defined is a corporation or partnership, any officer or director, partner or agent of such a trustee who actively participates in the action which violates this section or who, with knowledge of such violation by another officer, director, partner or agent, acquiesces therein, shall be guilty of a fraudulent breach of trust and punishable as such."

Section 47-1020, T. C. A.

The jury returned a verdict of "guilty as charged" without specifying which section of the Code it found the petitioner had violated. The Tennessee Supreme Court

held that the reading of these two sections of the Code to the jury was not in conflict with or prejudicial to the petitioner's rights and that since these statutes definitely define what constitutes a fraudulent breach of trust, it was proper for the trial judge to read the same in his charge to the jury, adding that Section 40-1802, Tennessee Code Annotated, provides that the indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the Court, on conviction, to pronounce the proper judgment; and then the Tennessee Supreme Court concluded that the indictment satisfied the requirements of a valid indictment.

There are three affidavits sought to be made a part of the record in the criminal case to the effect that the jury was not given the indictment and that it was not available to them during their deliberation of the case. One of these affidavits was signed by Henry V. Grady, who the record will show defended the petitioner in the criminal proceeding. This affidavit was filed September 30, 1963. Another affidavit was made by R. D. Elam, foreman of the jury in the criminal proceeding and filed September 30, 1963. A third was made by the trial judge, the Honorable Tillman Grant, who tried the case. The judge's affidavit was filed March 30, 1964. The motion for a new trial filed in the criminal proceeding was overruled May 27, 1963, and the petitioner was allowed sixty days in which to prepare and file his bill of exceptions. The bill of exceptions was filed July 24, 1963. (Appendix to Petition for Writ of Certiorari, Pages 52A-53A.)

BRIEF AND ARGUMENT.

Counsel for the Respondent insists that the first two questions set out by counsel for the petitioner really constitute only one to the effect that the petitioner was indicted under Section 39-4226, Tennessee Code Annotated, but proved to be guilty under Section 47-1020, Tennessee Code Annotated. He cites a number of United States Supreme Court cases, all to the effect that a conviction not sustained or supported by the proof constitutes a denial of due process to a defendant in a criminal proceeding as guaranteed by the Fourteenth Amendment, Constitution of the United States. There can be no disagreement with this proposition of law, but it is difficult to understand how it could be insisted that these cases are of any value to the petitioner. Cases are also cited to the effect that convictions based upon charges not made constitute a denial of due process and there can be no argument with this proposition of law but again it is not applicable here.

In the first place, the indictment does not state under which section of the Code, § 39-4226 or § 47-1020, it is brought. It merely alleges the facts constituting a fraudulent breach of trust and the allegations are sufficient to show a violation of both sections of the Code, § 39-4226 and § 47-1020. As a matter of fact, the latter section of the Code incorporates the first by its terms. So, it would appear that a reading of both to the jury was necessary in order to define the offense committed, and that the only test that should be applied is whether or not the language of the indictment was sufficient to inform the petitioner of the nature of his offense in clear and concise language to enable the pronouncement of a proper judgment by the trial judge. The following excerpt from **Russell v. United States**, 369 U. S. 749, 765-766, 82 S. Ct. 1038, 1047-1048, is not inconsistent with the requirements for a valid indictment under the Tennessee law:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.'" United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute." United States v. Simmons, 96 U. S. 360, 362, 24 L. Ed. 819. "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; * * *." United States v. Carll, 105 U. S. 611, 612, 26 L. Ed. 1135. "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124 U. S. 483, 487, 8 S. Ct. 571, 573, 31 L. Ed. 516. See also Pettibone v. United States, 148 U. S. 197, 204-206, 13 S. Ct. 542, 545, 37 L. Ed. 419; Blitz v. United States, 153 U. S. 308, 315, 14 S. Ct. 924, 927, 38 L. Ed. 725; Keck v. United States, 172 U. S. 434, 437, 19 S. Ct. 254, 255, 43 L. Ed. 505; Morissette v. United States, 342 U. S. 246, 270, n. 30, 72 S. Ct. 240, 253, 96 L. Ed. 288. Cf. United States v. Petrillo, 332 U. S. 1, 10-11, 67 S. Ct. 1538, 1543, 91 L. Ed. 1877. "That these basic principles of fundamental fairness retain their full vitality under modern con-

> cepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions."

The indictment in the case at bar sets out the species of the offense,—fraudulent breach of trust—and then relates the specific acts constituting the offense. Counsel for the Respondent knows of no rule in any jurisdiction requiring that the Code section violated must be cited as appears to be insisted upon by counsel for the petitioner.

Reliance is had upon affidavits by counsel for the petitioner in the criminal proceeding, the foreman of the jury which found the petitioner guilty in the criminal case, and the trial judge before whom it was heard. These affidavits were made long after the time had expired for preparing and filing the bill of exceptions. Section 27-111, Tennessee Code Annotated, allows a maximum of ninety days for preparing and filing the bill of exceptions after the motion for a new trial is overruled and provides, of course, that the trial judge may limit the time to not more than thirty days. In this particular case, he limited the time for preparing and filing the bill of exceptions to sixty days from the date of entry of the Order of the motion for a new trial. The Order overruling the motion for a new trial was entered May 27, 1963. Two of the affidavits were filed September 30, 1963, and the other March 30, 1964, long after the time for the bill of exceptions to be filed and long after the time it was in fact filed. The Tennessee Supreme Court in its opinion (Appendix to the Petition for Writ of Certiorari, Page 80A) held that these affidavits did not constitute a part of the record and were improper for consideration on review, citing **Sherman v. State**, 125 Tenn. 19, 140 S. W. 209. An excerpt from Page 51 of that case is as follows:

> "As to these matters occurring during the trial in the presence of the court, the trial judge is the

proper witness. Such matters must not be brought into a bill of exceptions merely by affidavits of parties or of counsel, but to be considered in this court, they must otherwise appear in the bill of exceptions, properly in narrative form. To such parts of a bill of exceptions, the attention of the trial judge is always directed, as no bare narration can be therein included without his authority, and he vouches for the accuracy of everything so stated. In any event, the trial judge must in some way certify or verify the actual occurrence of all things enacted in his presence upon the hearing, if such things are to be made the subject of complaint here."

The foregoing procedure is not inconsistent with that required by Rule 73 (g), **Rules of Civil Procedure**, and adopted by Rule 39 (b), **Rules of Criminal Procedure**, followed by the federal courts. The United States Supreme Court in **McCrone v. United States**, 307 U. S. 61, 65, 59 S. Ct. 685, 687, had this to say on the question:

"There remains the suggestion that the appeal in question can be considered a civil appeal properly taken under Rule 73 of the new Federal Rules of Civil Procedure which became effective September 16, 1938, 28 U. S. C. A., following section 723c. However, petitioner's notice of appeal was filed May 2, 1938. The controlling statute requires application for allowance of a civil appeal within three months after judgment from which appeal was sought. The three months expired July 28, 1938, and the contempt judgment had become unappealable well before the effective date of the new Rules. Therefore petitioner is not aided by the provision of Rule 86 that the new Rules shall 'govern all proceedings in actions then pending [September 16, 1938] . . . .' The action from which there was then no right of ap-

peal was not pending within the meaning of the Rule.

"The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals. Its judgment is affirmed."

In view of the foregoing, counsel for the Respondent submits that there is nothing set out in the petition filed in this cause nor the record or opinion of the Tennessee Supreme Court to indicate that the law in its regular course of administration through courts of justice was not applied in this cause as required by the Fourteenth Amendment, Constitution of the United States, and in accordance with the explanation in **Leeper et al. v. State of Texas**, 139 U. S. 462, 35 L. Ed. 225, holding that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary powers of the government unrestrained by the established principles of private right and distributive justice. **Hurtado v. California**, 110 U. S. 516, 535.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

By THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. John S. Wrinkle, Attorney at Law, 1521 Hamilton National Bank Building, Chattanooga, Tennessee, on this the 16 day of July, 1954.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.